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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

KICKAPOO TRADITIONAL TRIBE OF TEXAS,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EDMUND C. GOODMAN
HOBBS, STRAUS, DEAN & WALKER, LLP
806 SW Broadway
Ste. 900
Portland, OR 97205
(503) 242-1745

JENNIFER P. HUGHES
Counsel of Record
CHARLES A. HOBBS
JERRY C. STRAUS
JOSEPH H. WEBSTER
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L Street, NW, Ste. 700
Washington, DC 20037
(202) 822-8282
Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, 18 U.S.C. §1166-1168 (1988), granted states a limited role in the regulation of Indian gaming, through gaming "compacts" negotiated in "good faith" with tribes. To prevent state exercise of veto power over tribal gaming, the IGRA also authorized tribal suits in federal court to compel "good faith" negotiations allowing: (1) a court ordered mediation process for the selection of a compact by the mediator, and (2) a fallback remedy allowing the Secretary of the Interior to issue "procedures" regulating the gaming if a state refused to sign the mediator-selected compact. In *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), this Court held that the Eleventh Amendment prevented the application of IGRA's judicial remedy provisions to an unconsenting state, but did not disturb the Eleventh Circuit's ruling that Secretarial "procedures" were still available. The decision below, which rejected the Eleventh Circuit's analysis, has created a conflict among the circuits on this issue, which requires this Court to answer the critical questions left open by the *Seminole* decision:

1. Does a state's refusal to consent to IGRA's judicial remedy also nullify the Secretary's fallback authority to issue procedures to regulate Indian gaming? The Fifth Circuit held that it did, contrary to the reasoning of the Ninth and Eleventh Circuits.

2. If the Secretary's fallback authority to regulate Class III gaming is struck down, as the Fifth Circuit held, then a corollary question has to be decided –

should not IGRA's now-inappropriate requirement of a Tribal-State compact fall also, consistent with this Court's severance analysis under *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-85 (1987)? This question was fully argued by the Tribe, but the Fifth Circuit elected not to address it.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list represents all the parties appearing here and before the United States Court of Appeals for the Fifth Circuit:

Petitioner here is the Kickapoo Traditional Tribe of Texas, a federally-recognized Indian tribe. The Tribe originally joined this suit as a defendant-intervenor, alongside the other appellees at the Fifth Circuit (originally defendants in the District Court) the United States of America, the United States Department of the Interior, and the Secretary of the Interior, Dirk Kempthorne. The federal defendants have informed the Petitioner that they do not intend to file a petition for a writ of certiorari in this case.

Appellant below and respondent here is the State of Texas.

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The Kickapoo Traditional Tribe of Texas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 497 F.3d 491 (5th Cir., August 17, 2007) (Appendix A). The opinion of the District Court is reported at 362 F. Supp. 2d 765 (W.D. Tex., August 18, 2004)[1] (Appendix B).

JURISDICTION

The Court of Appeals denied the Tribe's and the United States' petition for rehearing *en banc* on November 28, 2007, and entered judgment December 6, 2007 (reprinted at Appendix C). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves provisions of the Indian Gaming Regulatory Act, Public Law 100-497, codified at 25 U.S.C. §§ 2701-2721, 18 U.S.C. §1166-1168 (1988) (relevant portions excerpted at Appendix D), the Procedures Regulations promulgated by the Secretary of the Interior under the authority of the Act, 25 C.F.R. Part 291 (Appendix E), and what are

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[1] The reported opinion reports the date of decision as August 18, 2004. The date of decision, however, was March 30, 2005. This Petition cites the case with the correct year: 2005.

known as the "general authority" statutes at 25 U.S.C. §§ 2 and 9 (Appendix F).

STATEMENT OF THE CASE

This Court is called upon to address the continuing validity of the Indian Gaming Regulatory Act ("IGRA" or the "Act") – one of the most important laws affecting Indian tribes ever enacted by Congress, for the purpose of enabling tribes to become self-supporting – in light of this Court's prior decision in *Seminole Tribe of Florida v. Florida.*[2] In *Seminole Tribe*, this Court struck, as applied, one portion of the Act – the judicial remedy that allowed tribes to sue a state without its consent where the state refused to negotiate a Class III gaming compact with the tribe – as unconstitutional. The Court, however, left open the question of whether Congress's fallback remedy for tribes (the issuance of Secretarial "procedures" to regulate tribal gaming when a state refuses to participate in the statutory compacting process) continued to survive.[3] Two circuit courts – the Ninth and Eleventh – have reasoned that the Secretarial procedures remedy does survive, in effect

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[2] *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996) (holding that IGRA's judicial remedy, which permitted a tribe to sue a state, was unconstitutional as applied when a state asserted its Eleventh Amendment sovereign immunity from such suit).

[3] *Seminole Tribe,* 517 U.S. at 76 n. 18 (noting that the Court "do[es] not here consider, and express[es] no opinion upon" that portion of the Eleventh Circuit's holding that the procedures remedy remains available to the Tribe). *See also Florida v. Seminole Tribe of Florida*, 517 U.S. 1133 (1996) (denying certiorari on state's petition to review that portion of the Eleventh Circuit's decision).

treating the *Seminole Tribe* decision as a limited severance of the judicial remedy only, since that was the only part of the remedial framework that was constitutionally flawed. In a decision at odds with its sister circuits, however, the court below has struck down the Secretary's attempt – through the Procedures Regulations at issue here – to maintain the continued effectiveness of as much of the remaining language of the Act as possible.

Moreover, and perhaps most far-reaching in its implications, the decision below refused to address the corollary argument repeatedly raised by the Tribe throughout this litigation,[4] that if the fallback provision of the Act (Secretarial procedures) is struck down, then should not the now-inappropriate requirement of a Tribal-State gaming compact be struck down as well? As the Fifth Circuit left it, the fallback remedy is no longer available to tribes. The Fifth Circuit's failure to address this question puts its decision at odds with this Court's precedent in *Alaska Airlines, Inc. v. Brock*[5] and numerous similar decisions,[6] which required the Fifth Circuit to ensure

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[4] Judge King, in her concurring opinion below, stated that this issue was not before the Fifth Circuit. *Texas v. United States*, 497 F.3d 491, 512 (5th Cir. 2007). The record, however, shows the Tribe repeatedly argued this issue from the beginning of the case in the District Court and up through the Fifth Circuit. *See* note 63, *infra*.

[5] *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-85 (1987).

[6] *See, e.g., United States v. Booker*, 543 U.S. 220, 246-49 (2005); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191(1999); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 767 (1996) (plurality opinion); *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality

that its severance of part of the statute (here, the availability to the Tribe of any remedy at all, where the state asserts its sovereign immunity to the judicial remedy) did not leave the remainder of the statute operating in a manner contrary to that intended by Congress. While acknowledging that the decision could result in an unintended state veto power over Indian gaming contrary to Congress's intent, the Fifth Circuit simply refused to take this necessary and required step.

The decision, if left standing, will have wide-ranging consequences. It will adversely impact the ability of all tribes in the Fifth Circuit to exercise their rights under IGRA to conduct gaming as a means of generating revenue where the state in which a tribe is located simply refuses to participate in the IGRA framework. It will adversely impact the relationships between states and tribes in other circuits by undermining the deliberate and careful balance of tribal rights and state authority crafted by Congress, creating confusion and sowing discord. The Court should accept certiorari to avoid these impacts and ensure that the Act continues to function as Congress intended.

A. FACTUAL BACKGROUND

Congress enacted IGRA in 1988 to provide a statutory framework for the regulation of Indian gaming with the intent of ensuring that such gaming

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opinion); *Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976) (*per curiam*) (quoting *Champlin Refining Co. v. Corp. Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932)).

was operated to provide tribes with revenue for carrying out important governmental functions.[7] The statute included a carefully balanced compromise between Indian tribes' pre-existing right to conduct gaming free of state regulation[8] and the states' desire to exercise authority in this area.[9] IGRA contains a limited opportunity for states to participate in the regulation of what the Act defines as "Class III" Indian gaming.[10] This opportunity is expressly conditioned upon a state's participation in IGRA's statutory scheme, which requires the state to negotiate a compact in good faith with the tribe,[11] as well as by IGRA's recognition and continued protection of a tribe's right to conduct such gaming if the state "permits such gaming for any purpose by any person, organization, or entity."[12]

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7 *See* 25 U.S.C. § 2701(1) (finding that "numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue"); § 2710(b)(2)(B) (limiting uses of gaming revenue to listed governmental purposes).

8 *See* 25 U.S.C. § 2701(5) ("Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."). *Accord California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

9 *See* 25 U.S.C. § 2710(d). *See also* S. Rep. No. 100-446, at 6 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3076.

10 Class III includes high-stakes gaming such as slot machines, casino games, lotteries, and pari-mutuel betting. 25 U.S.C. § 2703(8).

11 25 U.S.C. § 2710(d)(3)(A).

12 25 U.S.C. § 2710(d)(1)(B).

As part of this careful compromise, Congress included a remedial framework for tribes faced with states that refused to negotiate or negotiate in good faith.[13] The remedial framework involves two distinct stages. The first stage authorizes the tribe to sue the state in federal court, in which the state has the burden of demonstrating that it negotiated in good faith, and if it does not, mediation and negotiation of a compact is mandated.[14] The second stage is triggered only when the state refuses to consent to the compact chosen at the conclusion of the litigation process, at which point the statute *requires* the Secretary of the Interior to prescribe "procedures" in lieu of a compact under which the tribe can conduct Class III gaming on its lands.[15]

The Kickapoo Tribe's 125-acre reservation is located in a remote area outside Eagle Pass in Maverick County, Texas, along the border with Mexico. The vast majority of the Tribe's members live in poverty.[16] In an effort to raise increased governmental revenue to fund services to its members and to create jobs, the Kickapoo Tribe sought to exercise its rights under IGRA to offer those forms of Class III gaming permitted by the

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13 25 U.S.C. § 2710(d)(7)(A)(i), (B)(i-vii).

14 25 U.S.C. § 2710(d)(7)(B)(i-vi).

15 25 U.S.C. § 2710(d)(7)(B)(vii).

16 *See* (ROA, Attachments to Document #50, Exh. 3 (Joint Stipulations of Fact, FOF No. 18) and Exh. 4 (United States Census Bureau 2000 Data) (showing 68.1 percent of families and 74.3 percent of individuals for the geographic area of the Kickapoo (TX) Reservation are living below the poverty level) (This citation is to the Record on Appeal below in the Fifth Circuit).

State of Texas.[17] In 1995, the State refused to enter into negotiations with the Tribe, and the Tribe filed suit pursuant to IGRA on October 13, 1995.[18] Rather than attempt to demonstrate that its refusal to negotiate was in "good faith," the State moved to dismiss the lawsuit on sovereign immunity grounds. That motion was granted based on the *Seminole Tribe* decision, which held that IGRA's judicial remedy provisions waiving state sovereign immunity could not be constitutionally applied to an unconsenting state.

The *Seminole Tribe* decision revealed an unintended gap in IGRA: how to address the situation where a state refuses to participate in the statutory framework by affirmatively blocking – through its Eleventh Amendment immunity – the operation of the judicial remedy stage. The Secretary responded to this gap by promulgating the Procedures Regulations at issue here, consistent with the Eleventh Circuit's saving construction of IGRA in

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[17] 25 U.S.C. § 2710(d)(1)(B). Texas permits a broad range of Class III gaming including all lottery games (including keno, lotto and numbers); traditional casino style games; and off-track pari-mutuel betting and pari-mutuel betting through simulcasting as recognized by the U.S. Department of the Interior. May 24, 2007, Preliminary Scope of Gaming Decision, George Skibine, Acting Principal Assistant Secretary – Indian Affairs, to Juan Garza, Jr., Kickapoo Tribal Chairman, submitted to the Fifth Circuit on June 18, 2007. The scope of Class III gaming that should be allowed to the Tribe is not at issue in this case.

[18] *See Texas v. United States*, 362 F. Supp. 2d 765, 767 (W.D. Tex 2005).

the *Seminole Tribe* case.[19] The Procedures Regulations (which provide ample opportunity for state participation) are available to a tribe if, *and only if*, the state refuses to participate in the "good faith" suit and has the suit dismissed on sovereign immunity grounds.[20]

On December 11, 2003, the Tribe applied for Secretarial Procedures. On January 12, 2004, the Secretary invited the State of Texas to comment on the Tribe's proposal and submit an alternative. The State rejected the offer to participate, and instead filed this lawsuit.

B. PROCEEDINGS BELOW

The State filed this case in the United States District Court for the Western District of Texas on March 11, 2004, seeking a declaration and injunction against the Procedures Regulations promulgated by the Secretary pursuant to the IGRA.[21] Federal court jurisdiction was based on 28 U.S.C. § 1331 (federal question jurisdiction) and the Administrative Procedure Act, 5 U.S.C. § 705. The Tribe intervened as a party defendant. On March 30, 2005, upon cross-motions for summary judgment, the District Court held that (1) the State's case was not ripe, and (2) that the Secretary had the authority to promulgate the regulations, and ordered that the State's cause of action be dismissed without prejudice.

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19 *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994).

20 25 C.F.R. § 291.3(d), (e) (2007).

21 25 C.F.R. Part 291.

The State appealed to the United States Court of Appeals for the Fifth Circuit. Both the United States and the Tribe participated in the appeal. On August 17, 2007, the Court issued a fractured decision, with all three panel judges writing separately.[22] Chief Judge Jones delivered the opinion of the court on the issue of ripeness, joined by Judge King, holding that the State's cause of action was ripe.[23] Chief Judge Jones and Judge King concurred in the holding that the Procedures Regulations were invalid, but wrote separate and substantially differing opinions as to the grounds therefor. Judge Dennis wrote a detailed and comprehensive dissent.

The Tribe and the United States both filed timely petitions for rehearing *en banc*. The Fifth Circuit issued an order denying the petitions for rehearing on November 28, 2007. This petition for certiorari has been timely filed.

REASONS FOR GRANTING THE PETITION

This case involves an issue of exceptional importance that impacts Indian tribes and states around the country, as well as the United States. Under the result created by the decision below, tribes are barred from the fallback remedy Congress intended to be available to a tribe faced with a state that refuses to consent to IGRA's remedy process, thereby undoing Congress's careful compromise. The decision clashes with the reasoning of two sister

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[22] *Texas*, 497 F.3d at 491, 511 (King, J., concurring), 512 (Dennis, J., dissenting).

[23] While the Tribe argued below that the case was not ripe, it does not seek certiorari on the question of ripeness.

circuits on this same issue (the continued availability of the Secretarial procedures remedy in light of *Seminole Tribe*), fails to grant appropriate deference to the reasonable construction of a statutory gap by the Executive Branch official with delegated authority under the statute, and conflicts with this Court's directly relevant precedent concerning statutory severance.

I. The Fifth Circuit's Decision Creates a Conflict Among the Circuits on a Question of Exceptional Importance Concerning the Indian Gaming Regulatory Act

The two other circuits that have considered IGRA's remedial framework in light of *Seminole Tribe's* holding both reasoned that the Act can continue to function in the manner intended by Congress where the judicial remedy is severed, recognizing that a state's refusal to participate in the judicial remedy does not deprive a tribe of all its statutorily protected rights.[24] Rather, both circuits recognized the continued availability of the Secretarial procedures as a means of regulating and facilitating a tribe's right to offer Class III gaming when the tribe is located in a state that otherwise permits such gaming.[25]

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[24] *See United States v. Spokane Tribe*, 139 F.3d 1297, 1301-02 (9th Cir. 1998); *Seminole Tribe*, 11 F.3d at 1029 (11th Cir. 1994).

[25] Thus, under IGRA, the only tribes that would ever be completely unable to engage in Class III gaming are those tribes located in states that do not permit any Class III gaming anywhere in the state by anyone under any circumstances.

The Fifth Circuit's decision clashes with the reasoning of the Ninth and Eleventh Circuits concerning the impact of this Court's *Seminole Tribe* holding on the continuing availability of the fallback Secretarial procedures remedy. The primary opinion in the Fifth Circuit decision in fact misstates the case and its relation to *Seminole Tribe* from the first sentence, asserting that the Procedures Regulations are an attempt to "circumvent" the *Seminole Tribe* decision.[26] *Seminole Tribe*, however, did not strike down the second stage of the IGRA remedial framework, but rather left open the question of the continued availability of the fallback procedures remedy.[27] The Ninth and the Eleventh Circuits, contrary to the Fifth Circuit here, found that the continued availability of the Secretarial procedures remedy was *consistent with* the holding in *Seminole Tribe*, not a "circumvention" of it.[28]

The Ninth and Eleventh Circuits both reasoned that the Secretarial procedures remedy was an indispensable component of the regulatory structure and compromise framework established by IGRA, and that the judicial remedy could be severed or invalidated while still leaving this provision in place. The Eleventh Circuit in *Seminole Tribe*,

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26 *Texas*, 497 F.3d at 493.

27 *Seminole Tribe*, 517 U.S. at 76 n. 18. In fact, the Court refused to grant certiorari on this question. *Florida*, 517 U.S. 1133 (1996).

28 *Spokane Tribe*, 139 F.3d at 1301-02; *Seminole Tribe*, 11 F.3d at 1029. While the latter decision came out prior to this Court's decision in the same case, the holding on the key point – that IGRA's judicial remedy is invalid when the State does not consent – was the same.

consistent with this Court's subsequent decision on certiorari in that case, found that IGRA's judicial remedy provision was unconstitutional as applied to a state that did not consent to suit. The Eleventh Circuit also addressed the question of whether the entire IGRA (or at least all its state participation requirements) must be struck if the judicial remedy was determined to be unavailable, as the federal District Court for the Eastern District of Washington had previously held[29]:

> The final question we must resolve is whether all provisions for state involvement in class III gaming also fail, as the tribes contend. We hold that they do not. IGRA contains an explicit severability clause, § 2721; and we find no "strong evidence" to ignore that plain congressional directive. *See Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 686, 107 S.Ct. 1476, 1481, 94 L.Ed.2d 661 (1987). Nevertheless, we are left with the question as to what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit. The answer, gleaned from the statute, is simple. One hundred and eighty days after the tribe first requests negotiations with the state, the tribe may file suit in district court. If the state pleads an Eleventh Amendment defense, the suit is dismissed, and

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[29] *Confederated Tribes of Colville Reservation v. Washington,* No. CS-92-0426, slip op. at 4-5 (E.D. Wash. June 4, 1993); (ROA, Attachments to Doc. #50, Exh. 11) (striking down IGRA Class III provisions in absence of remedy for tribes) (This citation is to the Record on Appeal below in the Fifth Circuit).

> the tribe, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary then may prescribe regulations governing class III gaming on the tribe's lands. This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in § § 2701-02.[30]

Similarly, the Ninth Circuit also reasoned that the judicial remedy could be severed while leaving the procedures remedy intact, noting that:

> IGRA as passed thus struck a finely-tuned balance between the interests of the states and the tribes. Most likely it would not have been enacted if that balance had tipped conclusively in favor of the states, and without IGRA the states would have no say whatever over Indian gaming.[31]

The court went on to note that, in light of this

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[30] *Seminole Tribe*, 11 F.3d at 1029. Contrary to a previous assertion by the State of Texas, the Eleventh Circuit's determination that the Secretary has the authority to issue procedures was not *dictum* since it was a central and necessary part of the court's decision. *See Gochicoa v. Johnson*, 238 F.3d 278, 286 n.11 (5th Cir. 2000) (a statement is *dictum* only if it "could have been deleted without seriously impairing the analytical foundations of the holding"). As noted by the court: "The final *question we must resolve* is whether all provisions for state involvement in class III gaming also fail, as the tribes contend. We *hold* that they do not." *Seminole Tribe*, 11 F.3d at 1029 (emphases added).

[31] *Spokane Tribe*, 139 F.3d at 1301.

Court's decision in *Seminole Tribe,* the Eleventh Circuit's reasoning about the continued availability of the procedures remedy "is a lot closer to Congress's intent than mechanically enforcing IGRA against tribes even when states refuse to negotiate."[32]

As the Eleventh and Ninth Circuits both recognized, Congress did not delegate its regulatory authority over tribal gaming to states – it provided the states with an opportunity to participate in the compacting process along with the tribes and the federal government, and it conditioned that participation on the states' willingness to participate in the statutory process in good faith.[33] Congress intended for the good faith requirement to be enforceable in federal court, and provided for a judicially supervised mediation process under which the *state* has the burden of demonstrating that its refusal to negotiate a compact was done in good faith.[34] Recognizing that some states might still refuse to participate in the statutory process, Congress provided tribes with a fallback remedy – the ability to go directly to the Secretary of the Interior, who has the express statutory authority to prescribe "procedures" to govern tribal gaming in the absence of a compact.[35]

Congress did not anticipate that the Supreme Court would hold that it could not require states to participate in the judicially supervised component of the statutory process. With no way to compel

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32 *Id.* at 1302.

33 25 U.S.C. § 2710(d)(3)(A).

34 25 U.S.C. § 2710(d)(7)(B)(ii).

35 25 U.S.C. § 2710(d)(7)(B)(vii).

participation in the statutory process by states that will not waive their Eleventh Amendment immunity from suit, the tribes, states, and United States were left with an unintended gap in the statute. The Ninth and Eleventh Circuits reasoned that the Act could survive – i.e., could continue to function consistent with Congress's intent – by recognizing the continued availability of the Secretarial procedures remedy. The Secretary of the Interior, following this reasoning, exercised his general authority to promulgate regulations under 25 U.S.C. §§ 2 and 9, and his specific authority under 25 U.S.C. § 2710(d), and filled the gap with the Procedures Regulations at issue here: providing tribes located in states that will not participate in adjudication of their good faith or judicially supervised mediation of compact negotiations with a path to the fallback remedy provided by Congress.[36]

By invalidating the Procedures Regulations, the decision below has undermined the carefully structured compromise between tribes and states intended by Congress, based, largely, on the illogical ground that where a state asserts its sovereign immunity to *avoid* the judicial remedy it has somehow been *denied* the impartial decision maker intended by Congress.[37] As a result of the decision, states in the Fifth Circuit can bar tribal access to the fallback procedures mechanism – despite allowing gaming themselves – by simply refusing to negotiate and refusing to litigate the question of their lack of

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36 25 C.F.R. Part 291.

37 *Texas*, 497 F.3d at 508. The Procedures Regulations are available to a tribe if, and only after, the state asserts its immunity to the good faith lawsuit. 25 CFR § 291.3(d).

good faith in federal court: an outcome contrary to Congress's intent when enacting IGRA. The Court should accept certiorari to resolve the conflict among the circuits on this critically important matter.

II. The Fifth Circuit's Decision Ignores this Court's Relevant Authority Regarding an Exceptionally Important Issue of Administrative Law

The Fifth Circuit's ruling, and in particular the primary opinion by Chief Judge Jones, diverges substantially from existing relevant authority from this Court regarding the ability of an Executive Branch official to fill an unintended and unforeseen gap in a statute he was delegated authority to administer, and diverges from this Court's instruction to "respect and give effect to" the kinds of legislative compromises embodied in IGRA's remedial framework.[38] The Fifth Circuit inappropriately failed to grant deference to the Secretary's reasonable construction of that statute – which respects and gives effect to Congress's compromise in the IGRA – and thus plows new and uncharted ground in the field of administrative law.

First, the decision below focuses too narrowly on one provision of the Act when analyzing the Secretary's authority. *United States v. Mead Corp.* and other decisions instruct that, rather than analyze various sources of agency authority one-by-one (as the Fifth Circuit did below in determining that the Secretary had not been delegated sufficient authority

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[38] *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002).

to issue the Procedures Regulations), federal courts must take a more comprehensive and integrated approach to the statute(s) at issue.[39] Express delegation of general rulemaking authority is, these decisions hold, especially powerful grounds for deference,[40] as is the fact that Congress vested the agency with overall responsibility for administering or implementing a statute or program.[41] Here, the exercise of the Secretary's regulatory authority was grounded in such a delegation of authority. In addition to the Secretary's express delegated authority to carry IGRA into effect (including, specifically, the fallback remedy for tribes),[42] his authority to issue the regulations at issue was based on two statutes whose plain terms confer power on the President to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs" [43] and to the Commissioner of Indian Affairs (under direction of the Secretary of the Interior) to "have the management of all Indian affairs and of all matters arising out of Indian relations" pursuant to regulations adopted by the President.[44] Moreover,

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39 *United States v. Mead Corp.*, 533 U.S. 218, 226 (2001); *United States v. O'Hagan*, 521 U.S. 642, 673 n. 19 (1997).

40 *See Mead*, 533 U.S. at 226; *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392-93 (1999); *O'Hagan*, 521 U.S. at 673.

41 *See Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984); *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

42 *See* 25 U.S.C. §§ 2710(d)(8), 2710(d)(7)(B)(vii)).

43 25 U.S.C. § 9.

44 25 U.S.C. § 2. *See also Morton*, 415 U.S. at 231 ("In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary . . . .").

the decision below – directly contrary to the admonition of this Court – failed to grant the appropriate deference to the Secretary's determination of his own statutory authority.[45]

Second, the Fifth Circuit failed to follow this Court's admonition that it must accept the Secretary's interpretation if the following three factors are met: Congress has not previously spoken directly to the issue; the agency has been delegated authority under the statute; and the agency's interpretation is reasonable.[46] The Secretary's Procedures Regulations meet these three requirements: (1) in this case, Congress did not speak directly to the issue because it did not foresee a state's ability to assert Eleventh Amendment

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[45] *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 380-81 (1988) (Scalia, J., concurring). In this frequently cited concurring opinion, Justice Scalia collected numerous examples supporting this approach and explained:

> giving deference to an administrative interpretation of its statutory jurisdiction or authority is both necessary and appropriate. It is *necessary* because there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the "authority." And deference is *appropriate* because it is consistent with the general rationale for deference: Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction.

Id. at 381–82 (internal citations omitted).

[46] *Mead*, 533 U.S. at 229.

immunity to avoid its burden of demonstrating that its refusal to participate in IGRA was in "good faith"[47]; (2) Congress did, however, delegate authority to the Secretary of the Interior to implement the Act; and (3) the Secretary's interpretation of the statutory gap revealed by *Seminole Tribe* is reasonable, since it preserves the remaining part of the remedial framework and ensures that the statute continues to function consistent with the manner intended by Congress – keeping intact a critical part of a remedial framework specifically intended to protect IGRA's compromise between states and tribes.[48] In such situations, the question for courts to decide – with deference to agencies' expertise and their political accountability – is whether the agency resolution is "one that Congress would have sanctioned."[49]

Third, the decision below does not follow this Court's clear instruction that "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise."[50] Rather, the primary opinion in the decision below is concerned only with the preservation of a single "procedural safeguard," a judicial determination of whether the state met its

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47 25 U.S.C. § 2710(d)(7)(B)(ii). *See Spokane*, 139 F.3d at 1300 (quoting Senator Inouye, one of IGRA's sponsors, as stating "if we had known that this proposal of tribal state compacts that came from the States and was strongly supported by the States, would later be rendered virtually meaningless by the action of those states . . . we would not have gone down this path").

48 *Spokane*, 139 F.3d at 1302; S. Rep. No. 100-446, at 13.

49 *City of New York v. FCC*, 486 U.S. 57, 69 (1988).

50 *Mead*, 533 U.S. at 229.

burden of demonstrating that it negotiated in good faith – a determination that is unavailable to a state *only if the state chooses not to participate.* This cramped reading of the statute is inconsistent with the underlying purpose of the statute and the context of its enactment, in which Congress did not expressly limit the Secretary's broad powers to authorize gaming, except to the extent that it required a compact for Class III gaming and specifically established a series of steps to ensure such a compact was reached. In that context, given that the Act itself requires the Secretary to promulgate gaming procedures in the event that the judicial process fails, the regulations must be accepted "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[51]

This Court should grant certiorari to ensure that the Fifth Circuit remains consistent with relevant Court precedent on this important question of administrative law.

III. The Fifth Circuit's Ruling Conflicts with Relevant Decisions of this Court by Failing to Meet its Obligation under the Judicial Severance Doctrine

Finally, the Fifth Circuit's decision conflicts with relevant decisions of this Court regarding judicial severance of statutes. As this Court instructed in *Alaska Airlines,*[52] even where a statute, like IGRA, has a severability clause, the resulting

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51 *Chevron*, 467 U.S. at 845.

52 480 U.S. at 685.

statute after severance of its unconstitutional provisions cannot remain in force if that resulting statute would be inconsistent with Congress's intent. As articulated in *Alaska Airlines*, where a statute is judicially severed it must be done in such a way to ensure that "the statute will function in a *manner* consistent with the intent of Congress."[53] If this cannot be done, the statute must be declared invalid. The purpose of this obligation is obvious: to protect the constitutional separation of powers by ensuring that courts do not legislate. By failing to meet this obligation, the Fifth Circuit's ruling has encroached on the policy-making domain reserved to Congress under the Constitution.

By refusing to recognize the validity of the Procedures Regulations, but failing to address the question of the continuing validity of IGRA's provisions for state involvement in Class III gaming, the panel's decision has the potential to result in a version of IGRA that Congress did not intend to pass. Congress enacted the IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" and:

> to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the

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53 *Id.* (emphasis in original).

operator and players.[54]

The IGRA granted states a limited, conditional opportunity (through the compacting process) to participate in the regulation of Indian Class III gaming that states previously lacked, but also provided a remedy for tribes to be able to conduct Class III gaming in those situations where a state objects to such gaming and refuses to enter into a compact.

The IGRA's express statutory language as well as its legislative history demonstrates that Congress did not intend for states to have a veto over tribal gaming under IGRA. The IGRA's statutory findings note, for example, that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government" and that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."[55] The Committee Report accompanying the bill stated:

> It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.[56]

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54 25 U.S.C. § 2702(1), (2).

55 25 U.S.C. § 2701(4), (5).

56 *See* S. Rep. No. 100-446, at 13.

Granting the state a role in the regulation of gaming was meant to be consistent with these findings and purposes, and not an opportunity for the state to undermine them. For this reason Congress enacted the remedial provisions of the IGRA, including the fallback remedy of Secretarial procedures, to ensure that tribal rights would be protected. Therefore, under the severance doctrine, when the first stage of the remedial process – the "good faith" lawsuit – is declared void where the state refuses to participate, the fallback remedy of Secretarial procedures must remain in place as a saving construction of the statute to ensure that the statute continues to operate in the manner intended by Congress. This limited severance is in fact consistent with the severability clause in the statute[57] as well as with the severability doctrine itself, since severing the judicial remedy while leaving the procedures remedy in place (which does not share the constitutional flaw of subjecting a state to suit without its consent) is consistent with the intent of Congress in ensuring that tribes have a remedy when faced with a recalcitrant state.

The Eleventh Circuit has already expressly held, in severing the judicial remedy provision of IGRA, that the Secretary has both the power and the duty to issue procedures under the circumstances provided for in the Regulations at issue, noting that this is a "solution [that] conforms with IGRA and serves to achieve Congress' goals, as delineated in

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57 25 U.S.C. § 2721.

§§ 2701-02."[58] Only by determining that a tribe could go directly to the Secretary for procedures as a fallback remedy did the Eleventh Circuit hold that the Class III compact requirements could stand under a traditional severance analysis, thus recognizing the continued availability of Secretarial procedures as a saving construction necessary to preserve congressional intent.[59]

The Ninth Circuit Court of Appeals ultimately agreed with the Eleventh Circuit's rationale in the *Spokane* case, rejecting its own earlier criticism.[60] Thus, the two circuit courts which have previously addressed the issue both agree that it is proper to sever the unsound portions of IGRA with a saving construction that maintains the Secretary's authority to fill the gap in IGRA's remedial framework.[61]

In the decision below, the concurring opinion acknowledges that without the Procedures Regulations IGRA would not function as Congress intended – that the decision could result in an

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58 *Seminole Tribe*, 11 F.3d at 1029.

59 *Id.* Although requested to do so by the States of Florida and Alabama, this Court did not address the decision of the Eleventh Circuit on this issue, and it thus remains the law of that Circuit. *Seminole Tribe of Florida*, 517 U.S. at 76 n.18. *See also Florida*, 517 U.S. 1133 (rejecting separate certiorari petition on this issue).

60 *Spokane Tribe*, 139 F.3d at 1302 ("the Eleventh Circuit's suggestion is a lot closer to Congress's intent than mechanically enforcing IGRA against tribes even when states refuse to negotiate").

61 *See also Santee Sioux Nation v. Norton*, No. 8:05 CV147, 2006 WL 2792734, at *6 (D. Neb. Sept. 26, 2006).

unintended state veto power.[62] The Fifth Circuit's failure to take the next step of determining whether it is necessary to strike down IGRA's state participation requirements, puts it in direct conflict with the statutory severance analysis set out by this Court in *Alaska Airlines* and other decisions.

The Tribe has consistently argued throughout this case that *Seminole Tribe's* limited severance of IGRA's judicial remedy mechanism requires the continued availability of the fallback procedures remedy as a saving construction of the statute.[63] In the alternative, and as a necessary corollary to this argument, the Tribe also argued that if the Secretary cannot fill the gap in IGRA's remedial framework for tribes that face unconsenting states, then the entirety of IGRA's requirements regarding state participation must be declared void as applied when the state refuses to participate in the IGRA remedial process. [64] The Fifth Circuit, however, failed to address these well-established and long-standing

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62 *Texas*, 497 F.3d at 512 (noting that, as a result of this decision, the state now has "the leverage to block gaming on Indian land under IGRA in a manner wholly contrary to Congress's intent").

63 The following citations to the record are to the Record of Appeal below in the Fifth Circuit. *See* Tribe's Brief in Opposition to Preliminary Injunction (March 26, 2004) at 8–9 (ROA 00220-21); Tribe's Brief in Support of Motion to Dismiss and for Summary Judgment (August 18, 2004) at 31–39 (ROA "Document #50); Tribe's Response to State's Motion for Summary Judgment (August 18, 2004) at 10 (ROA 00809); Tribe's Summary Judgment Reply Brief (September 7, 2004) at 3 (ROA 00877); Transcript of Summary Judgment Hearing (October 26, 2004) at 52:22–58:16 (ROA Volume 7); Tribe's Fifth Circuit Appellate Brief (August 23, 2005) at 46–50.

64 *Id.*

severance principles set forth by the Supreme Court and to discharge its obligation under those principles.

If IGRA were left without a remedy for tribes, the statute will no longer function in the manner intended by Congress, as the Ninth and Eleventh Circuits have already held (and as the concurrence below concedes). Therefore, this remedy of the Secretarial procedures cannot be removed from the statute without all its state participation requirements being held invalid when a tribe faces an unconsenting state.[65]

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65 *Alaska Airlines*, 480 U.S. at 684; *Seminole*, 11 F.3d at 1029. While IGRA has a severability clause (25 U.S.C. § 2721), that clause merely creates a rebuttable presumption against the need to declare the entire statute invalid. *Alaska Airlines*, 480 U.S. at 686. At issue here is what portion of the statute needs to be severed to remove the unconstitutional portion while retaining as much of the framework intended by Congress as possible. Moreover, this presumption of severability, even if applicable to this case, would be overcome here because the severance by the decision below will result in a statutory scheme (1) that no longer functions in the manner Congress intended, (2) that bears little resemblance to the scheme enacted by Congress, and (3) that would not be fully operative as a law. *Id.* at 684-85. *See also Confederated Tribes of Colville Reservation*, No. CS-92-0426, slip op. at 4-5; (ROA, Attachments to Doc. #50, Exh. 11) (striking down IGRA Class III provisions in absence of remedy for tribes) (This citation is to the Record on Appeal below in the Fifth Circuit).

CONCLUSION

The Fifth Circuit's decision improperly jettisons Congress's careful compromise in IGRA. In so doing it clashes with the reasoning of its sister circuits, unduly substitutes its reasoning for that of the Executive Branch official charged with implementing the Act, and grants states power unintended by Congress. The decision violates a fundamental precept of statutory construction, which states that "[c]ourts and agencies must respect and give effect to these sorts of compromises."[66] The Kickapoo Traditional Tribe of Texas respectfully requests that its petition for writ of certiorari be granted so that this Court can complete the analysis on the critical questions left open by *Seminole Tribe*.

Respectfully Submitted,

EDMUND C. GOODMAN
HOBBS, STRAUS, DEAN
& WALKER, LLP
806 SW Broadway
Suite 900
Portland, OR 97205
(503) 242-1745

JENNIFER P. HUGHES
Counsel of Record
CHARLES A. HOBBS
JERRY C. STRAUS
JOSEPH H. WEBSTER
HOBBS, STRAUS, DEAN &
WALKER, LLP
2120 L Street, NW
Suite 700
Washington, DC 20037
(202) 822-8282

February 25, 2008

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66 *Ragsdale*, 535 U.S. at 94 (citing *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 818-819 (1980)).

APPENDIX

APPENDIX A: *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007)
(United States Court of Appeals for the Fifth Circuit – Opinion Below)

United States Court of Appeals Fifth Circuit
FILED August 17, 2007
Charles R. Fulbruge III Clerk

REVISED SEPTEMBER 13, 2007

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-50754

STATE OF TEXAS,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; DIRK KEMPTHORNE, in his Official Capacity as Secretary of the Department of the Interior,

Defendants-Appellees,

KICKAPOO TRADITIONAL TRIBE OF TEXAS,

Intervenor-Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

Before JONES, Chief Judge, and KING and DENNIS, Circuit Judges.

EDITH H. JONES, Chief Judge:

This is high-stakes litigation involving a challenge to procedures adopted by the Secretary of the Interior Department ("Secretary") to circumvent the consequences of the Supreme Court's Eleventh Amendment decision in Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114 (1996). An initial question is whether Texas's challenge to the existence of the Secretarial Procedures is ripe now, before the Secretary has made a substantive determination on a tribe's Class III gaming license. We hold that the case is ripe, the State has standing, and the Secretary lacked authority to promulgate the regulations. The district court's judgment is REVERSED and REMANDED.

I. BACKGROUND

In the 1980s, various Indian tribes began to seek authority for legalized gambling as a way to earn revenue. As sovereigns, Indian tribes are subordinate only to the federal government. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207, 107 S. Ct. 1083, 1087 (1987). State laws, however, "may be applied to tribal Indians on their reservations if Congress has expressly so provided." Id. In Cabazon, the Supreme Court held that because Congress had not so expressly provided, California could not enforce certain anti-gambling laws against an Indian tribe there. Id. at 214, 221-22, 107

S. Ct. at 1091, 1094-95.

In response to Cabazon, Congress enacted the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 et seq., to give states a subordinate but significant role in regulating tribal gaming. IGRA separates gaming into classes of escalating stakes. Class I gaming – social games played for minimal value – is within the exclusive jurisdiction of the tribes. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class II gaming – bingo and related activities – is subject to oversight by the National Indian Gaming Commission. 25 U.S.C. §§ 2703(7), 2706(b), 2710(a), (b) & (c). All other forms of gaming, including high-stakes games such as slot machines, casino games, lotteries, and dog racing, are Class III. 25 U.S.C. § 2703(8).

Class III gaming, if authorized by the tribe, must be "conducted in conformance with a Tribal-State compact entered into by the Indian Tribe and the State." 25 U.S.C. § 2710(d)(1). In IGRA, Congress meticulously detailed two separate tracks leading to the institution of a Class III tribal gaming business. On the first track, the tribe and the state may negotiate a voluntary compact governing the conduct of gaming activities, which takes effect essentially upon approval by the Secretary. § 2710(d)(3)(B).

The second track begins when no compact has been reached one hundred eighty days after the tribe requests negotiations. IGRA then allows a tribe to file suit against the state in federal court and seek a determination whether the state negotiated in good faith. § 2710(d)(7). If the court finds the state negotiated in good faith, the tribe's proposal fails. On

a finding of lack of good faith, however, the court may order negotiation, then mediation. If the state ultimately rejects a court-appointed mediator's proposal, the Secretary "shall prescribe, in consultation with the Indian tribe, procedures . . . under which class III gaming may be conducted." § 2710(d)(7)(B).

The Supreme Court held this second track of the congressional scheme flawed under the Eleventh Amendment, because Congress has no authority to abrogate a state's sovereign immunity from suit under the Indian Commerce Clause of Article I of the Constitution. See Seminole Tribe, 517 U.S. at 47, 116 S. Ct. at 1119. Following Seminole Tribe, a state may waive immunity from suit, or the United States may sue the state to obtain the statutory good-faith determination, but a state cannot be forced to submit to the tribe's suit. Seminole Tribe made the second track toward Class III gaming far more difficult to pursue.

To work around the decision, the Secretary promulgated notice-and-comment regulations in 1999. See Class III Gaming Procedures, 25 C.F.R. pt. 291 ("Secretarial Procedures" or "Procedures"). The Secretarial Procedures only apply if the state asserts its sovereign immunity and refuses to consent to a tribe's statutory good-faith suit. 25 C.F.R. §§ 291.1(b), 291.3. In such event, an eligible tribe may submit a Class III gaming proposal to the Secretary, who then affords the state sixty days to comment and submit an alternative proposal. 25 C.F.R. § 291.7. At that point, the Secretarial Procedures prescribe two tracks depending on whether the state chooses to submit an alternative compact proposal.

If the state does not submit an alternative proposal, the Secretary reviews the tribe's proposal and either approves it or offers the opportunity for a conference between the state and the tribe to address "unresolved issues and areas of disagreements in the proposal." 25 C.F.R. § 291.8. The Secretary must then make a "final decision either setting forth the Secretary's proposed Class III gaming procedures for the Indian tribe, or disapproving the proposal." Id.

If the state submits an alternative plan, the Secretary appoints a mediator who, following the same procedures as IGRA prescribes, will resolve differences between the two proposals. 25 C.F.R. §§ 291.9, 291.10. While, under the Procedures, the Secretary may reject the mediator's proposal, he "must prescribe appropriate procedures within 60 days under which Class III gaming may take place." 25 C.F.R. § 291.11 (emphasis added).

The difference between IGRA and the Secretarial Procedures is that IGRA compels appointment of a mediator by the court only after a judicial finding that the state failed to negotiate in good faith, but under the Secretarial Procedures, the gaming proposal goes forward without any judicial bad-faith determination if the state refuses to waive sovereign immunity. The Secretarial Procedures, in sum, offer two alternatives for a state that insists upon its sovereign immunity: refuse to negotiate, participate (or not) in an informal conference, and take a chance that the Secretary will not accept the tribe's Class III gaming proposal, 25 C.F.R. § 291.8; or submit its "last best proposal" to a mediator, with the

certainty that Class III gaming must be approved on the mediator's or the Secretary's terms. 25 C.F.R. § 291.11.

In 1995, the Kickapoo Traditional Tribe of Texas (the "Kickapoo") petitioned the State to enter into a compact facilitating Class III gaming on its land. Texas rejected the Kickapoos' offer. The tribe's federal lawsuit against Texas was eventually dismissed under Seminole Tribe. In 2004, the Kickapoo submitted a proposal to the Secretary, who followed the Secretarial Procedures and invited Texas to comment. Texas responded with this lawsuit asking the court to declare the Secretarial Procedures unauthorized and unconstitutional.

II. STANDARDS OF REVIEW

This court reviews a district court's legal conclusions, including the decision whether to grant a summary judgment motion, de novo. Garcia v. LumaCorp, Inc., 429 F.3d 549, 553 (5th Cir. 2005). Jurisdictional issues such as ripeness and standing, as well as questions of statutory interpretation, are also legal questions for which review is de novo. See Bonds v. Tandy, 457 F.3d 409, 411 (5th Cir. 2006) (standing); Groome Res. Ltd., L.L.C., v. Parish of Jefferson, 234 F.3d 192, 198-99 (5th Cir. 2000) (ripeness); In re Reed, 405 F.3d 338, 340 (5th Cir. 2005) (statutory interpretation). A district court's factual findings, including those on which the court based its legal conclusions, are reviewed for clear error. See Rivera v. Wyeth-Ayerst Labs., 283 F.3d 315, 319 (5th Cir. 2002).

III. DISCUSSION

The district court determined in a thoughtful opinion that Texas had standing to sue, but that the State's claims were not ripe for adjudication. See Order on Defendants' Motion to Dismiss, Kickapoo Traditional Tribe of Texas v. State of Texas, Cause No. P-95-CA-66 (W.D. Tex. Apr. 2, 1996). The court thus dismissed. Nevertheless, it also opined that the Secretary had implied authority under IGRA and his general statutory responsibility for Indian tribes to promulgate the Procedures. Texas v. United States, 362 F. Supp. 2d. 765, 769-70 (W.D. Tex. 2004). The State appealed. Responding to the parties' contentions in this court, we conclude that Texas has standing to sue, that its case is ripe, and that the Secretarial Procedures are unauthorized by statute.

A. Justiciability

Appellees first contend that Texas has no standing to seek invalidation of the Secretarial Regulations because Texas has suffered no injury from the mere existence of the Secretarial Procedures and, in any event, Texas brought any injury on itself by raising a sovereign immunity defense to the Kickapoo Tribe's enforcement suit. Relatedly, Appellees argue that Texas's claims are not ripe because any injury that Texas could suffer from the Procedures would only manifest if the Secretary were to prescribe gaming procedures for the tribe at some point in the future. We disagree with each contention.

The standing and ripeness doctrines flow largely from Article III of the Constitution, which limits the federal judicial power to the resolution of cases and controversies. Valley Forge Christian Coll.

v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 471, 102 S. Ct. 752, 757-58 (1982) (discussing the underpinnings of standing doctrine). In general terms, standing is concerned with whether a proper party is bringing suit, while ripeness is concerned with whether the suit is being brought at the proper time. See Elend v. Basham, 471 F.3d 1199, 1205 (11th Cir. 2006). However, the doctrines often overlap in practice, particularly in an examination of whether a plaintiff has suffered a concrete injury, see id. at 1205, and our injury-in-fact analysis draws on precedent for both doctrines.

1. Standing

"The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.'" Flast v. Cohen, 392 U.S. 83, 99, 88 S. Ct. 1942, 1952 (1968) (quoting Baker v. Carr, 369 U.S. 186, 204, 82 S. Ct. 691, 703 (1962)). To meet the constitutional standing requirements, (1) the plaintiff must have suffered an "injury in fact," defined as an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of, such that the injury is fairly traceable to the challenged action of the defendant; and (3) it must be likely, not merely speculative, that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992). Texas, as the party invoking

federal jurisdiction, bears the burden of establishing that the standing requirements are met. See id. at 561, 112 S. Ct. at 2136.

Texas alleges two ways in which the Secretarial Procedures have caused it to suffer an injury in fact, contending first that the existence of the Secretarial Procedures has reduced the state's bargaining power relative to that of the Kickapoo,[1] and second that the Secretarial Procedures subject Texas to a process for approval of Class III gaming that omits IGRA's procedural safeguards and thus exceeds the Secretary's regulatory authority. The latter argument, in other words, is that Texas has suffered the injury of being compelled to participate in an invalid administrative process, and we agree that standing exists on this basis.

At the outset of IGRA's enforcement process, the statute provides for tribe-initiated court review of a state's good faith. Once a tribe makes a prima facie showing, the state has the opportunity to prove its good faith to the court and forestall the remainder of the enforcement process, which includes court-ordered mediation and possible secretarial approval of gaming procedures. Texas interprets this as a statutory promise that states will be spared mediation and

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[1] While the Supreme Court has held that the denial of a "statutory bargaining chip" can "inflict[] a sufficient likelihood of economic injury to establish standing," Clinton v. City of New York, 524 U.S. 417, 432, 118 S. Ct. 2091, 2101 (1998), it is unclear whether a reduction in bargaining power unaccompanied by economic injury or other concrete injury can constitute an injury in fact. We do not reach this issue because Texas's other alleged injury in fact is sufficient to support standing.

secretarial action unless a court has determined that the state negotiated in bad faith.

Contrary to Appellees' suggestion that Texas faces nothing more than the possibility that the Secretary might someday approve of gaming procedures for Kickapoo land, Texas is presently being subjected to an administrative process involving mediation and secretarial approval of gaming procedures even though no court has found that Texas negotiated in bad faith. Because Texas challenges the Secretary's authority to undertake this process, Texas has alleged a sufficient injury for standing purposes. Cf. Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580, 105 S. Ct. 3325, 3332 (1985) (holding that a challenge to a statutory system of arbitration was ripe because the plaintiffs' "injury [was] not a function of whether the [arbitration] tribunal awards reasonable compensation but of the tribunal's authority to adjudicate the dispute"); Middle S. Energy Inc. v. Ark. Pub. Serv. Comm'n, 772 F.2d 404, 410 (8th Cir. 1985) (challenge to a state agency's ongoing proceedings was ripe because the plaintiff "challenge[d] not the state's ultimate substantive decision but its authority to even conduct the contemplated proceeding"). The alleged injury is not hypothetical because the Secretarial Procedures have already been applied to Texas: The Kickapoo Tribe submitted a Class III gaming application to the Department of the Interior, the Secretary notified Texas and the tribe that the application met the relevant eligibility requirements, and the Secretary invited Texas to comment on the proposal and submit

an alternative proposal.[2] Texas's only alternative to participating in this allegedly invalid process is to forfeit its sole opportunity to comment upon Kickapoo gaming regulations, a forced choice that is itself sufficient to support standing. See Union Carbide, 473 U.S. at 582, 105 S. Ct. at 3333 (recognizing "the injury of being forced to choose between relinquishing [the benefit of an unlawful adjudicatory process] . . . or engaging in an unconstitutional adjudication"). As the Supreme Court observed in Lujan,

> [w]hen the suit is one challenging the legality of government action or inaction . . . [and] the plaintiff is himself an object

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[2] In accordance with the Secretarial Procedures, the Department of the Interior informed the Kickapoo that their proposal was completed on December 11, 2003. See 25 C.F.R. § 291.6(b). On May 24, 2007, the Secretary issued a preliminary "scope-of-gaming decision" in response to the tribe's proposal. According to the Secretary,

> [t]he Tribe should be authorized to engage in the following gaming activities under Class III procedures pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii)(I), subject to the requirements discussed in [the scope-of-gaming decision]: (1) traditional casino-style games; (2) any lottery game including keno, numbers and lotto; and (3) off-track pari-mutuel betting and pari-mutuel betting through simulcasting on any gaming activity occurring off Tribal lands. The Tribe is not authorized to operate gaming machines.

This recent, preliminary scope-of-gaming decision illustrates the concrete impact of the choice that the Secretarial Procedures had forced Texas to make, as Texas's decision to forgo this allegedly invalid process has left it unable to influence important decisions such as the type of gaming activities that the Secretary will allow on Kickapoo land.

> of the action (or forgone action) at issue . . . , there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

504 U.S. at 561-62, 112 S. Ct. at 2137. We are satisfied that Texas has alleged an injury in this case.

The causation and redressability requirements for standing are satisfied as well. The injury that Texas claims is directly traceable to the Secretary's applying the Secretarial Procedures to Texas, and a judicial invalidation of the Secretarial Procedures would give Texas direct relief from being effectively forced to participate in this process. Although the United States argues that Texas brought the injury on itself by invoking a sovereign immunity defense, it provides no support for the proposition that an injury cannot be fairly traceable to a defendant if the plaintiff's acts motivated the defendant to undertake its injurious acts. The State did not cause the Secretary of the Interior to promulgate the Secretarial Procedures, nor did it cause the Secretary to apply the process to Texas. The State's sovereign immunity defense is a prerequisite to secretarial action only because the Secretarial Procedures so provide.

Accordingly, Texas has standing to challenge the validity of the Secretarial Procedures.

2. Ripeness

> [The] basic rationale [of the ripeness doctrine] is to prevent the courts,

> through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Labs. v. Gardner, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 1515 (1967), overruled on other grounds, Califano v. Sanders, 430 U.S. 99, 97 S. Ct. 980 (1977). To determine if a case is ripe for adjudication, a court must evaluate (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. See id. at 149. The fitness and hardship prongs must be balanced, Am. Forest & Paper Ass'n v. EPA, 137 F.3d 291, 296 (5th Cir. 1998), and "[a] case is generally ripe if any remaining questions are purely legal ones." New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 833 F.2d 583, 587 (5th Cir. 1987). Yet "even where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness."[3] Cent. & Sw. Servs. v. EPA, 220 F.3d 683, 590 (5th Cir. 2000).

A challenge to administrative regulations is fit

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[3] Texas relies on a case from another circuit for the proposition that hardship is an issue only if a case is not fit for review. See Fla. Power & Light v. EPA, 145 F.3d 1414, 1421 (D.C. Cir. 1998) ("When a challenged decision is not 'fit' for review, the petitioner must show 'hardship' in order to overcome a claim of lack of ripeness."). We need not explore this contention here.

for review if (1) the questions presented are "purely legal one[s]," (2) the challenged regulations constitute "final agency action," and (3) further factual development would not "significantly advance [the court's] ability to deal with the legal issues presented." Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 812, 123 S. Ct. 2026, 2032 (2003) (internal quotation marks and citations omitted); Abbott Labs., 387 U.S. at 149-54, 87 S. Ct. 1515-18. An additional consideration is "whether resolution of the issues will foster effective administration of the statute." Merchs. Fast Motor Lines, Inc. v. ICC, 5 F.3d 911, 920 (5th Cir. 1993); Abbott Labs., 387 U.S. at 154, 87 S. Ct. at 1518.

Appellees do not dispute that the issues involved in this case are purely legal, but their arguments with regard to the remaining fitness principles are all based on the mistaken belief that Texas's alleged injury is the speculative harm that could result if the Secretary were ultimately to approve gaming procedures for Kickapoo land. As discussed in the standing inquiry, this is incorrect, as Texas claims present injury from submission to an invalid agency process, regardless whether the Secretary ultimately allows gaming on Kickapoo land.

With this distinction in mind, Texas's claims are fit for adjudication. The challenged Secretarial Procedures are a "final agency action," as they are final rules that were promulgated through a formal, notice-and-comment rulemaking process after announcement in the *Federal Register*. See Abbott Labs., 387 U.S. at 150-51, 87 S. Ct. at 1516-17. Additional fact-finding would not aid our inquiry into

the purely legal question of their validity. And resolution of this issue now will give both the Secretary and Congress significant guidance into how IGRA's provisions may be administered in the particular situation addressed in this case. Appellees submit no relevant arguments as to why this issue is not presently fit for judicial resolution.

We also agree with Texas that it would suffer hardship if we were to withhold consideration of its claims. The Supreme Court has found hardship to inhere in legal harms, such as the harmful creation of legal rights or obligations; practical harms on the interests advanced by the party seeking relief; and the harm of being "force[d] . . . to modify [one's] behavior in order to avoid future adverse consequences." Oh. Forestry Ass'n v. Sierra Club, 523 U.S 726, 734, 118 S. Ct. 1671 (1998). Texas faces this third type of harm. If Texas cannot challenge the Procedures in this lawsuit, the State is forced to choose one of two undesirable options: participate in an allegedly invalid process that eliminates a procedural safeguard promised by Congress, or eschew the process with the hope of invalidating it in the future, which risks the approval of gaming procedures in which the state had no input. See Abbott Labs., 387 U.S. at 152, 87 S. Ct. at 1517 (finding hardship where administrative regulations forced the plaintiffs either to comply with a challenged requirement and incur significant costs or refuse to comply and risk prosecution); cf. Union Carbide, 473 U.S. at 581, 105 S. Ct. at 3333 (finding hardship where the plaintiffs "suffer[ed] the continuing uncertainty and expense of depending for compensation on a process whose authority is undermined because its constitutionality

is in question").

We therefore agree with Texas that its challenge to the Secretarial Regulations is ripe for adjudication.

B. Merits

On the merits, to which we now turn, Texas contends that the Procedures violate the constitutional separation of powers and nondelegation doctrines and are contrary to and unauthorized by IGRA or any other federal statute. To avoid resolution of any constitutional issues, it is sufficient to consider whether the Procedures are authorized by IGRA or the general Indian trust statutes under the Chevron test.

1. Statutory Background

To put this dispute in clearer perspective, one must recall that although states have no constitutional authority over Indian reservations, Congress had consistently authorized states to regulate or prohibit certain activities on the reservations. The Supreme Court significantly altered the assumed state-tribal relationship when, in the 1987 Cabazon Band decision, it expansively interpreted a federal statute to prevent states from prohibiting certain tribal gambling activities.

Congress responded to Cabazon Band by finishing work on IGRA, a gambling-enabling statute for Indian reservations that had been pending in the legislative process for several years. It is unnecessary to repeat our previous summary of the statute's complex provisions. Suffice it to say that among those

provisions is a "carefully crafted and intricate remedial scheme"[4] whereby, if a tribe and state do not voluntarily enter a compact for Class III gaming, the principal alternative is for the tribe to sue the state in federal court and secure a determination that the state had not negotiated in good faith.[5] 25 U.S.C. § 2710(d)(7)(A)(i). What constitutes good-faith negotiating by the state is left unexplained. An easy, minimal inference is that a state's insistence upon its general policy against legalized Class III gambling would constitute "good faith," but that determination, along with numerous other issues such as the necessary "fit" between a state's policy and the scope of Class III gaming sought by a tribe, is left to a federal court — a clearly neutral forum. Under IGRA, a federal court finding that the state negotiated in good faith ends the bargaining process. On a finding of lack of good faith, however, the court may order negotiation, § 2710(d)(7)(B)(iii), then mediation. § 2710(d)(7)(B)(iv). The court appoints a mediator. If a state refuses to consent to the mediator's proposed compact (which must blend the "last best offers" of each party), the Secretary is then authorized to prescribe procedures that will bind the state. Moreover, the Secretary must adopt procedures "consistent with the [mediator's] proposed compact . . . ." § 2710(d)(7)(B)(vii)(I). This statutory balance on its face cabins the Secretary's authority while implanting neutral factfinders on the decisive questions of good faith and the final imposition of a compact on an unwilling or uncooperative state.

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[4] Seminole Tribe, 517 U.S. at 73-74, 116 S. Ct. at 1132.

[5] Even after Seminole Tribe, the federal government may sue a state on behalf of a tribe to pursue IGRA's remedial process without jurisdictional impediment.

Absent the Seminole Tribe decision, this remedial plan is self-contained and fully sufficient. No one contends that the Secretary could have promulgated his alternative Procedures under IGRA before Seminole Tribe was decided. Nonetheless, the Appellees insist that IGRA implicitly conferred on the Secretary the power to substitute the Secretarial Procedures for the judicial remedy foreclosed by Seminole Tribe. This court must therefore move into the realm of the Chevron doctrine to determine whether the Secretarial Procedures faithfully interpret IGRA or, as the Appellees also assert, the general Indian trust statutes. See Class III Gaming Procedures, 64 Fed. Reg. 17,535-02, 17,536 (Apr. 12, 1999) (Secretary asserts authority to prescribe the Procedures based on the statutory delegation of powers contained in 25 U.S.C. § 2710(d)(7)(B)(vii) of IGRA and 25 U.S.C. §§ 2 and 9).

2. Chevron Step-One Analysis

The authority of administrative agencies is constrained by the language of the statute they administer. See Massachusetts v. EPA, __U.S.__, 127 S. Ct. 1438, 1462 (2007). Under the Chevron doctrine, courts assess the validity of challenged administrative regulations by determining whether (1) a statute is ambiguous or silent concerning the scope of secretarial authority and (2) the regulations reasonably flow from the statute when viewed in context of the overall legislative framework and the policies that animated Congress's design. See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82 (1984).

a.

Under Chevron step one, the inquiry is "whether Congress has directly spoken to the precise question at issue." Id. at 842, 104 S. Ct. at 2781. Judicial deference is due only "if the agency interpretation is not in conflict with the plain language of the statute." Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417, 112 S. Ct. 1394, 1401 (1992) (citing K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 292, 108 S. Ct. 1811, 1818 (1988)). Step one includes challenges to an agency's interpretation of a statute, as well as whether the statute confers agency jurisdiction over an issue. See generally FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 120 S. Ct. 1291 (2000). "Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" Id. at 125, 120 S. Ct. at 1297 (quoting ETSI Pipeline Project v. Missouri, 484 U.S. 495, 517, 108 S. Ct. 805, 817 (1988)).[6]

As was shown above in our discussion of the statute, the plain language of IGRA permits limited secretarial intervention only as a last resort, and only after the statute's judicial remedial procedures have been exhausted. See 25 U.S.C. § 2710(d)(7)(B)(i)-(vi). Congress did not explicitly authorize the Secretarial

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[6] Additionally, courts "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." Chevron, 467 U.S. at 133, 120 S. Ct. at 1301.

Procedures. Under Chevron step one, when, as here, "the statute is clear and unambiguous, that is the end of the matter; for [this] court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." K Mart, 486 U.S. at 291, 108 S. Ct. at 1817 (quoting Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 368, 106 S. Ct. 681, 685 (1986)); Chevron, 467 U.S. at 842-43, 104 S. Ct. at 2781-82.[7]

b.

Chevron deference "comes into play, of course, only as a consequence of statutory ambiguity, and then only if the reviewing court finds an implicit delegation of authority to the agency." Sea-Land Serv., Inc. v. Dep't of Transp., 137 F.3d 640, 645 (D.C. Cir. 1998) (citing Chevron, 467 U.S. at 842-44, 104 S. Ct. at 2781-83). Thus, even if there were an ambiguity concerning whether IGRA permits the Secretarial Procedures without exhaustion of its judicially-controlled remedy, an equally salient fact is that "[m]ere ambiguity in a statute is not evidence of congressional delegation of authority." Michigan v. EPA, 268 F.3d 1075, 1082 (D.C. Cir. 2001)(citing

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[7] It is noteworthy that the "Indian canon" of statutory construction has no bearing on this case because IGRA unambiguously defines the scope of secretarial authority and the conditions under which such authority may be lawfully exercised. See Negonsott v. Samuels, 507 U.S. 99, 110, 113 S. Ct. 1119, 1125-26 (1993) (courts do not "resort to [the Indian] canon of statutory construction" when a statute is unambiguous (citation omitted)); Cabazon Band of Mission Indians v. Nat'l Indian Gaming Comm'n, 14 F.3d 633, 637 (D.C. Cir. 1994) ("When the statutory language is clear, as it is here, the [Indian] canon may not be employed.").

cases); Montana v. Clark, 749 F.2d 740, 745 (D.C. Cir. 1984) ("[D]eference to an agency's interpretation constitutes a judicial determination that Congress has delegated the norm-elaboration function to the agency and that the interpretation falls within the scope of that delegation." (emphasis in original) (citation omitted)). The Appellees' argument attempts to obviate Chevron's delegation requirement by contending that, despite IGRA's meticulous description of the protracted remedial prelude to the Secretary's involvement in approving Class III gaming without a state's consent, this court can nonetheless discover a silent, or "implicit," delegation of secretarial authority. That is, Appellees contend that even though Congress specifically addressed the circumstances under which secretarial authority can be exercised — and even though those circumstances are absent here — the Secretary's actions are justifiable because IGRA does not explicitly address the Eleventh Amendment issue that arose in the wake of Seminole Tribe.

Courts encountering this kind of "whatever-it-takes" approach to Chevron analysis in the past have rejected it. See, e.g., Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC, 962 F.2d 27, 33 (D.C. Cir. 1992) (appeals to a statute's broad purposes do not allow the discovery of implicit delegations of authority when Congress has explicitly delineated the boundaries of delegated authority). When Congress has directly addressed the extent of authority delegated to an administrative agency, neither the agency nor the courts are free to assume that Congress intended the Secretary to act in situations left unspoken. See Nat'l R.R. Passenger Corp. v. Nat'l

Ass'n of R.R. Passengers, 414 U.S. 453, 458, 94 S. Ct. 690, 693 (1974) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." (quoting Botany Worsted Mills v. United States, 278 U.S. 282, 289, 49 S. Ct. 129, 132 (1929))).[8] Accordingly, administrative agencies and the courts are "bound, not only by the ultimate purposes Congress has selected but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." MCI Telecomm. Corp. v. AT&T Corp., 512 U.S. 218, 231 n.4, 114 S. Ct. 2223, 2232 n.4 (1994) (emphasis added).

Thus, at the heart of the Appellees' delegation argument is the assumption that since Congress did not explicitly withhold secretarial rulemaking authority in the event that a tribe is unable to obtain a judicial determination of the state's bad faith, the ensuing congressional "silence" creates an implicit delegation under Chevron to promulgate Class III gaming regulations.

That is an inaccurate interpretation of the nature of the delegation inquiry under Chevron's first step. "Agency authority may not be lightly presumed." Michigan, 268 F.3d at 1082. "Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with

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[8] See also Pub. Serv. Comm. of State of N.Y. v. FERC, 866 F.2d 487, 491-92 (D.C. Cir. 1989) (executive agencies "cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions there defined").

Chevron and quite likely with the Constitution as well." Ethyl Corp. v. EPA, 51 F.3d 1053, 1060 (D.C. Cir. 1995); Michigan, 268 F.3d at 1082.[9] It stands to reason that when Congress has made an explicit delegation of authority to an agency, Congress did not intend to delegate additional authority sub silentio. See Backcountry Against Dumps v. EPA, 100 F.3d 147, 151 (D.C. Cir. 1996) (finding that explicit congressional delegation of authority precludes an implicit delegation more expansive than Congress's express terms). Courts recognize an implicit delegation of rulemaking authority only when Congress has not spoken directly to the extent of such authority, or has "intentionally left [competing policy interests] to be resolved by the agency charged with administration of the statute." Chevron 467 U.S. at 865-66, 104 S. Ct. at 2793.

In IGRA, Congress plainly left little remedial authority for the Secretary to exercise. The judicially-managed scheme of good-faith litigation, followed by negotiation, then mediation, allows the Secretary to step in only at the end of the process, and then only to adopt procedures based upon the mediator's proposed compact. The Secretary may not decide the state's

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[9] Nor can congressional silence on an issue be used as a panacea justifying rulemaking authority untethered from any trace of congressional intent. "To suggest, as the [Secretary] effectively does, that Chevron step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power . . . is both flatly unfaithful to the principles of administrative law and refuted by precedent." Am. Bar Ass'n v. FTC, 430 F.3d 457, 468 (D.C. Cir. 2005) (quoting Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (emphasis in original)).

good faith; may not require or name a mediator; and may not pull out of thin air the compact provisions that he is empowered to enforce. To infer from this limited authority that the Secretary was implicitly delegated the ability to promulgate a wholesale substitute for the judicial process amounts to logical alchemy.

c.

Citing Seminole Tribe, Appellees further contend that a judicial decision can, ex post facto, create a Chevron-type "gap" that introduces ambiguity into the operation of a statutory scheme and thereby authorizes an administrative agency to step in and remedy the ambiguity. This claim ignores Chevron's well-established requirement that any delegation-engendering gap contained in a statute, whether implicit or explicit, must have been "left open by Congress," not created after the fact by a court. Chevron, 467 U.S. at 866, 104 S. Ct. at 2793 (emphasis added).[10]

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[10] Moreover, no other circuit court to have considered the propriety of the Secretarial Procedures in light of IGRA has discovered the statutory gap purportedly created by Seminole Tribe. The Eleventh Circuit has suggested without any analysis that if a state asserted Eleventh Amendment immunity against a tribe's lawsuit, the judicial good-faith determination was severable and unnecessary, and the Secretary could simply enforce against the state regulations governing Class III gaming. See Seminole Tribe of Fla. v. Florida, 11 F.3d 1016, 1029 (11th Cir. 1994), aff'd, 517 U.S. 44, 116 S. Ct. 1114 (1996). A close reading of the Eleventh Circuit's decision, however, demonstrates that it meant to allow the Secretary to proceed under IGRA as if a judicial finding of lack of good faith had been made and a court-appointed mediator failed to bring the parties to terms. See id. (citing § 2710(d)(7)(B)(vii) as the basis for the Secretarial Procedures). Nowhere does the Eleventh Circuit claim that a state's exercise of

Although later enacted statutory provisions may be relevant to determine congressional intent for purposes of Chevron ambiguity, see Brown & Williamson, 529 U.S. at 143-44, 120 S. Ct. at 1306-07, there is no support for the proposition that later court decisions affect or effect ambiguity. Chevron's delegation inquiry gauges congressional intent that is independent from subsequent administrative or judicial constructions of a statute. See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982, 125 S. Ct. 2688, 2700 (2005)("[W]hether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur."); see also Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208, 109 S. Ct. 468, 471 (1988)("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). Accordingly, even though court interpretation of IGRA produced the unexpected result that a state may "veto" Class III gaming by exercising its Eleventh Amendment sovereign immunity, that outcome has no bearing on the scope of the administrative authority originally delegated by Congress to the Secretary.

When it so desires, Congress has the power to

Eleventh Amendment sovereign immunity creates a statutory gap. Likewise, considering IGRA in the wake of the Supreme Court's Seminole Tribe decision, the Ninth Circuit reaffirmed the centrality of the statutory balancing of interests in IGRA's remedial scheme, yet did not mention the apparent gap Appellees claim was created by the Supreme Court. See United States v. The Spokane Tribe of Indians, 139 F.3d 1297, 1299-1300 (9th Cir. 1998).

confer expansive interpretive authority on agencies to accommodate changing or unpredictable circumstances. See, e.g., Massachusetts, __U.S. at__, 127 S. Ct. at 1462 ("The broad language of [Clean Air Act] § 202(a)(1) reflects an intentional effort to confer flexibility necessary to forestall . . . obsolescence."). Likewise, Congress knows well how to cabin agency authority through specific definitions that pretermit flexible interpretation. See, e.g., Ethyl Corp., 51 F.3d at 1058 (Congress unambiguously expressed that waiver decisions made under Clean Air Act § 211(f)(4) are based exclusively on one criterion). However, the fact that later-arising circumstances cause a statute not to function as Congress intended does not expand the congressionally-mandated, narrow scope of the agency's power. For example, in evaluating the validity of the Federal Reserve's interpretation of the Bank Holding Company Act in Dimension Financial, the Supreme Court observed that:

> Congress defined with specificity certain transactions that constitute banking subject to regulation. The statute may be imperfect, but the [Federal Reserve] Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute. If the Bank Holding Company Act falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, not that Board or the courts, to address.

Dimension Fin. at 374-75, 106 S. Ct. at 689.[11] In strikingly similar terms, the Seminole Tribe Court rejected Florida's invitation to prescribe a remedy unsupported by the language and legislative history of IGRA. 517 U.S. at 76, 116 S. Ct. at 1133 ("Nor are we free to rewrite [IGRA's] statutory scheme in order to approximate what we think Congress might have wanted had it known that § 2710(d)(7) was beyond its authority. If that effort is to be made, it should be made by Congress, not by the federal courts.").[12]

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[11] Under the Chevron analysis, the question is whether Congress could be said to have delegated explicit or implicit authority to the agency to deal with an issue. We focus here on implicit delegation since IGRA indisputably does not address the post-Seminole Tribe state of affairs. The Dissent suggests that Congress effects an implicit delegation of legislative authority each time it decides an issue and withholds power from the agency in so doing. Following this ungainly line of reasoning to its conclusion, the Dissent would hold that any time a court overturns a statute speaking expressly to an administrative issue, the agency has been delegated de facto implicit authority to revise the procedure as it sees fit. That result stands Congress's exertion of power on it head, transforms a denial of agency authority into an implicit delegation thereto, and radically undercuts the Supreme Court's attempt in Chevron to distinguish between congressional power and agency authority in a principled way. In the Indian gaming context, Congress reacted to the Cabazon Band decision by adopting a highly complex scheme to balance the tribal-state interests inherent in Indian gaming. Congress could have simply authorized the Secretary to promulgate compacts however he chose to do so, or, it could have refrained from acting entirely. It took neither route. Instead, it explicitly withheld power from the Secretary to accomplish IGRA's balancing scheme. As Dimension Financial states, no court decision can restore power that was withheld by Congress.

[12] This comment was made in the context of the Supreme Court's rejection of a judicially crafted Ex Parte Young remedy — not the Secretarial Procedures at issue in this appeal. But

Nor does the fact that judicial interpretation of a statute leads to consequences unforeseen by Congress make a statute "ambiguous" within the meaning of Chevron. See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 567, 125 S. Ct. 2611, 2625 (2005)(rejecting legislative history that might have demonstrated Congress "did not intend" to overrule a case because the statutory language was unambiguous that Congress did in fact overrule the case); In re Abbott Labs., 51 F.3d 524, 528-29 (5th Cir. 1995) (applying the plain meaning of a statute even though that construction "may have been a clerical error"); see also Thompson v. Goetzmann, 337 F.3d 489 (5th Cir. 2003). In Thompson,the Department of Health & Human Services sought deference for its interpretation of a particular term, as construed in the applicable regulations and in its lawsuit for Medicare reimbursement. The court stated:

> [W]e reiterate that the courts are not in the business of amending legislation. If the plain language of the MSP statute produces the legislatively unintended result claimed by the government, the

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Florida's proposed Ex Parte Young remedy was rejected by the Supreme Court because, like the Secretarial Procedures, it was contrary to the "carefully crafted and intricate remedial scheme set forth in § 2710(d)(7)" by Congress. Seminole Tribe, 517 U.S. at 73-74, 116 S. Ct. at 1132. The Supreme Court's reason for rejecting the Ex Parte Young remedy thus applies with equal force to the Secretarial Procedures here. Nevertheless, we acknowledge that the Court explicitly refused to consider the Eleventh Circuit's "substitute remedy" of Secretarial Procedures. Id. at 76, 116 S. Ct. at 1133; see also 517 U.S. 1133, 116 S. Ct. 1416 (1996) (mem.).

> government's complaint should be addressed to Congress, not to the courts, for such revision as Congress may deem warranted, if any.

Id. at 493. Court decisions cannot serve to dilate or contract the scope of authority delegated by Congress to an administrative agency because delegation is a matter of legislative intent, not judicial interpretation. Thus, if Congress did not originally intend to confer rulemaking authority, the Secretary cannot synthesize that authority from a judicial opinion.[13]

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[13] The United States' analogy to the Coal Act cases fails to lend support to its endorsement of the unauthorized actions Interior has taken in this case. The Fourth Circuit's decision in The Pittston Co. v. United States, 368 F.3d 385 (4th Cir. 2004), stands only for the proposition that an administrative agency's interpretation of a statute in light of a subsequent judicial decision may be permissible if that interpretation is (1) faithful to the authority Congress originally delegated to the agency and (2) does not contradict the plain language of the statute. That uncontroversial stance shares our view that the scope of authority delegated by Congress to an administrative agency is not altered by subsequent developments. See, e.g., Brand X, 545 U.S. at 983, 125 S. Ct. at 2700. As the Pittston court recognized, the beneficiary reassignments undertaken by the Social Security Commissioner in the wake of Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S. Ct. 2131 (1998), did not "violate[] or disturb[] the structure of the Coal Act . . . . [The Commissioner] followed the Coal Act's assignment structure to the letter. . . . [T]he fact and method of applying the Coal Act . . . have not changed." 368 F.3d at 404-05; see also A.T. Massey Coal Co. v. Holland, 472 F.3d 148, 167 (4th Cir. 2006) ("[D]elegation must appear from the statute itself, not from the agency's actions"); Sidney Coal Co. v. Soc. Sec. Admin., 427 F.3d 336, 347 n.15 (6th Cir. 2005). The same cannot be said of the Secretary's actions. In stark contrast to the Commissioner's reassignments in Pittston, here the Secretary did not promulgate Class III gaming regulations that correspond to

3. Reasonableness of Secretarial Procedures Under Chevron's Step Two

Even were we to conclude under the Chevron step-one analysis that Seminole Tribe effected a sub rosa delegation of administrative authority allowing the Secretary to ignore Congress's explicit limitation of his authority in § 2710(d)(7)(B)(vii), the Secretarial Procedures still cannot pass muster under Chevron step two because they do not reasonably effectuate Congress's intent for IGRA. "If [the agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," a court will not disturb that choice "unless it appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned." Chevron, 467 U.S. at 845, 104 S. Ct. at 2783 (quoting United States v. Shimer, 367 U.S. 374, 382-83, 81 S. Ct. 1554, 1560-61 (1961)); see also United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131, 106 S. Ct. 455, 462 (1985) (Chevron step two entails evaluation of agency action "in light of the language, policies and legislative history of the Act.").

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the structure of IGRA. Instead, the Secretary has erected an ersatz remedial scheme that exceeds the authority Congress delegated to the Secretary under IGRA's remedial provisions. Pittston does not support the creation of a novel remedial scheme never envisioned by Congress and specifically contradictory of Congress's expressed intent concerning the scope of secretarial rulemaking. The application of a preexisting remedial scheme to a narrower pool of plan participants that was approved in Pittston is not remotely analogous to the wholesale invention of the remedial scheme that we are confronted with in the Secretarial Procedures. Pittston lends no support for the unprecedented "gapfilling" that the Secretary has undertaken in this case.

In any event, "[p]olicy considerations cannot override our interpretation of the text and structure of the Act." Cent. Bank of Denver, N.A., v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 188, 114 S. Ct. 1439, 1453-54 (1994). "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Chevron, 467 U.S. at 843 n.9, 104 S. Ct. at 2782 n.9. Thus, as with the delegation inquiry, Chevron step two compels a judicial evaluation of congressional intent. Because the Secretary's actions clearly violate IGRA's intent, they are unreasonable.

In IGRA, Congress struck a "finely-tuned balance between the interests of the states and the tribes" to remedy the Cabazon Band prohibition on state regulation of Indian gaming. United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1301 (9th Cir. 1998); S. REP. NO. 100-446, at 2 (1988), as reprinted in 1988 U.S.C.C.A.N. 3071, 3071-72 (noting Cabazon Band's holding that tribes "have a right to conduct gaming activities on Indian lands unhindered by State regulation"). Congress attempted to "provide a means by which tribal and State governments can realize their unique and individual governmental objectives" by giving tribes the opportunity to negotiate a Class III gaming compact, and by giving states the protection of an objective judicial intermediary in case negotiations prove unsuccessful. S. REP. NO. 100-446, at 13 (1988), as reprinted in 1988 U.S.C.C.A.N. 3071, 3083.

The lynchpin of IGRA's balancing of interests is the tribal-state compact. Melding the provisions for

negotiation of a compact with the remedial structure ultimately included in IGRA took over five years to accomplish legislatively.[14] Moreover, IGRA's legislative history amply demonstrates that Congress viewed the compact as an indispensable prerequisite to Class III gaming. See id. at 6, as reprinted in 1988 U.S.C.C.A.N. 3071, 3076 ("[IGRA] does not contemplate and does not provide for the conduct of Class III gaming activities on Indian lands in the absence of a tribal-State compact"); id. ("tribes will be unable to enter into [Class III] gaming unless a compact is in place"). Congress considered — and rejected — other remedial structures that did not guarantee states such protections. The legislature eventually settled on IGRA's judicial remedy and the tribal-state compact requirement as the "best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises." Id. at 13, as reprinted in 1988 U.S.C.C.A.N. 3071, 3083.

Congressional intent on this score is pellucid. In order to conduct Class III gaming, tribes must either: (1) negotiate a voluntary compact with the state, see 25 U.S.C. § 2710(d)(3)(A)-(C); (2) obtain the state's agreement to the mediator-selected compact that follows the judicial good-faith process, see § 2710(d)(7)(B)(iii)-(vi); or (3) obtain secretarial Class III procedures based on the mediator-selected compact, see § 2710(d)(7)(B)(vii)(I). Absent a tribal-

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[14] The legislation to enable Indian gaming was first introduced as H.R. 4566, 97th Cong. (1983), by Representative Morris Udall in 1983. S. 555, 100th Cong. (1988), introduced by Senator Daniel Inouye, was enacted into law as IGRA in 1988.

state compact, the statute forbids tribes to offer Class III gaming.

The tribal-state compact is in fact so central to the IGRA process that it is the only means by which the tribe can avoid incurring liability under other federal statutes that regulate Indian gaming. Two statutes, both of which antedate IGRA, are relevant to this issue. First, the Johnson Act, 15 U.S.C. § 1175 et seq., prohibits the possession or use of "any gambling device . . . within Indian country." Id. § 1175(a). Second, 18 U.S.C. § 1166 punishes gambling in Indian country in derogation of state law. Congress coordinated IGRA with these criminal provisions by providing that the tribal-state compact is the exclusive means of avoiding gaming-related violations.[15] Apart from the limited circumstances in which IGRA allows Class III gaming to be imposed by the Secretary following exhaustion of the judicial good-faith/mediation process, Class III gaming remains illegal in Indian country without a tribal-state compact.

The role the Secretary plays and the power he wields under the Procedures bear no resemblance to the secretarial power expressly delegated by Congress under IGRA. First, IGRA interposes, before any

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[15] See IGRA § 2710(d)(6) (Johnson Act does not apply to gaming conducted under a tribal-state compact); see also United States v. Cook, 922 F.2d 1026, 1034 (2d Cir. 1991) (Johnson Act liability waived only by a Class III gaming compact between a state and tribe). Likewise, 18 U.S.C. § 1166(c)(2), referencing IGRA, excepts "class III gaming conducted under a Tribal-State compact." See, e.g., Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1031 (2d Cir. 1990) (tribal-state compact required for waiver of 18 U.S.C. § 1166 liability).

secretarial involvement, the requirement that an impartial factfinder determine whether the state has negotiated in good faith. See § 2710(d)(7)(B)(iii). Under the Secretarial Procedures, however, it matters not that a state undertook good-faith negotiations with the tribe: The Secretary may prescribe Class III gaming irrespective of a state's good faith. See 25 C.F.R. § 291.7-.8. This result contravenes the plain language of IGRA.

Second, under IGRA, if mediation is ordered, it is undertaken by a neutral, judicially-appointed mediator who objectively weighs the proposals submitted by the state and tribe. See § 2710(d)(7)(B)(iv). Under the Procedures, however, the Secretary selects the mediator. 25 C.F.R. § 291.9. In light of the Secretary's statutory trust obligation to protect the interests of Indian tribes, this aspect of the Procedures is stacked against the objective interest-balancing Congress intended and creates the strong impression of a biased mediation process. See, e.g., Kickapoo Tribe of Indians of Kickapoo Reservation in Kan. v. Babbitt, 43 F.3d 1491, 1499 (D.C. Cir. 1995) (noting that "the Secretary was not in a position to champion the State's position in view of his trust obligations to the tribe." (citing Heckman v. United States, 224 U.S. 413, 444-45, 32 S. Ct. 424, 433-34 (1912))). Common sense dictates that the Secretary cannot play the role of tribal trustee and objective arbiter of both parties' interests simultaneously. Congress did not intend this incoherent result.

Third, whereas under IGRA's remedial scheme the court-appointed mediator essentially defines the regulations that the Secretary may promulgate, the

Procedures enable the Secretary to disregard not only the mediator's proposal, but also the proposals of the state and tribe.[16] IGRA's remedial process makes clear that Congress did not intend to delegate to the Secretary unbridled power to prescribe Class III regulations.

Fourth, the Secretarial Procedures contemplate Class III gaming in the absence of a tribal-state compact — directly in derogation of Congress's repeated and emphatic insistence. See, e.g., S. REP. NO. 100-446, at 6 (1988), as reprinted in 1988 U.S.C.C.A.N. 3071, 3076 ("[IGRA] does not contemplate and does not provide for the conduct of class III gaming activities on Indian lands in the absence of a tribal-State compact.").[17] The only exception to the compact requirement Congress envisioned was the promulgation of procedures after a bad-faith determination and in concert with the proposal

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[16] Compare § 2710(d)(7)(B)(vii) ("the mediator shall notify the Secretary and the Secretary shall prescribe . . . procedures (I) which are consistent with the proposed compact selected by the mediator under clause (iv)) with 25 C.F.R. § 291.11(c) ("If the Secretary rejects the mediator's proposal . . . he/she must prescribe appropriate procedures within 60 days under which Class III gaming may take place that comport with the mediator's selected proposal as much as possible, the provisions of IGRA, and the relevant provisions of the laws of the State.").

[17] Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1570 (1998) ("SENSE OF THE SENATE CONCERNING INDIAN GAMING. It is the sense of the Senate that the United States Department of Justice should vigorously enforce the provisions of the Indian Gaming Regulatory Act requiring an approved Tribal-State gaming compact prior to the initiation of class III gaming on Indian lands.")

selected by a court-appointed mediator. Yet in spite of this single statutory exception — the product of IGRA's complex and balanced remedial scheme — Appellees maintain it is equally reasonable to assume that Congress intended a waiver of liability under the Johnson Act and 18 U.S.C. § 1166 even without a judicial determination of bad faith; without the participation of a court-appointed mediator; and without the requirement that the regulations ultimately promulgated be "consistent with the proposed compact selected by the [court-appointed] mediator." § 2710(d)(7)(b)(vii)(I).[18]

For all these reasons, the Secretary's Class III Procedures are not a reasonable interpretation of

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[18] Commentators have noted the problems with the Procedures. See Rebecca S. Lindner-Cornelius, Note, The Secretary of the Interior as Referee: The States, The Indian Nations, and How Gambling Led to the Illegality of the Secretary of the Interior's Regulations in 25 C.F.R. § 291, 84 MARQUETTE L. REV. 685, 695 (2001) (arguing that the regulations are unconstitutional and noting that "when a state claims it has negotiated in good faith to no avail, the only recourse it is left with is a biased factfinder who can do what it wants without any state input"); Nicholas S. Goldin, Note, Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gaming, 84 CORNELL L. REV. 798, 843-44 (1999) (arguing that the Procedures are "troubling" because the Secretary "assumes a massive unilateral power that Congress did not intend to delegate" and because the Procedures "make a travesty of the concept of federalism and in its place substitute a system in which Washington claims it knows best what state laws mean"); Joe Laxague, Note, Indian Gaming and Tribal-State Negotiations: Who Should Decide the Issue of Bad Faith?, 25 J. LEGIS. 77, 91 (1999) (arguing that the Procedures "do both parties a disservice and badly skew the balance of interests intended by Congress when it wrote the IGRA").

IGRA, especially when viewed against "their place in the overall statutory scheme." Brown & Williamson, 529 U.S. at 133, 120 S. Ct. at 1301. The Secretary, of course, is not authorized to promulgate regulations in violation of federal law, see Sohappy v. Hodel, 911 F.2d 1312, 1320 (9th Cir. 1990), yet the Secretarial Procedures stand in direct violation of IGRA, the Johnson Act, and 18 U.S.C. § 1166 insofar as they may authorize Class III gaming without a compact. Because "the Executive Branch is not permitted to administer the Act in a manner that is inconsistent with the administrative structure that Congress enacted into law," and because doing so constitutes an unreasonable interpretation of Congress's intent, the Secretarial Procedures cannot pass muster under Chevron step two. ETSI Pipeline Project, 484 U.S. at 157, 108 S. Ct. at 817.

4. General Authority Statutes

An alternative contention raised by Appellees is that secretarial authority to promulgate the Procedures derives from the general Indian trust statutes when read in concert with § 2710(d)(7)(B)(vii). See 25 U.S.C. §§ 2, 9; 64 Fed. Reg. 17,535-02, 17,536 (Apr. 12, 1999). To be sure, courts may consider "generally conferred authority" in the statutory scheme to determine the propriety of administrative agency action. United States v. Mead Corp., 533 U.S. 218, 229, 121 S. Ct. 2164, 2172 (2001). But sections 2 and 9 do not grant Interior "a general power to make rules governing Indian conduct." Organized Vill. of Kake v. Egan, 369 U.S. 60, 63, 82 S. Ct. 562, 564 (1962). Instead, the authority Congress there delegated to the Secretary only allows prescription of regulations that implement "specific

laws," id., and that are consistent with other relevant federal legislation. See Morton v. Ruiz, 415 U.S. 199, 232, 94 S. Ct. 1055, 1073 (1974); N. Arapahoe Tribe v. Hodel, 808 F.2d 741, 748 (10th Cir. 1987) (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S. Ct. 814 (1971)). Thus, in Village of Kake, the Secretary issued fishing regulations ostensibly permitted under the White Act and the Alaska Statehood Act. However, the regulations, which allowed the Kake community to operate four fish traps, violated Alaska's anti-fish-trap and conservation law. Because Interior could point to no affirmative statutory grant of authority that allowed the Secretary to issue regulations in derogation of state law, the Supreme Court held that the Secretary had exceeded the authority granted by sections 2 and 9. Id. at 62, 82 S. Ct. at 564. Village of Kake demonstrates that the Secretary lacks carte blanche to issue regulations pursuant to a generalized grant of authority untethered from the confines of preexisting statutorily defined rights. See United States v. Eberhardt, 789 F.2d 1354, 1360 (9th Cir. 1986).

For example, in Eberhardt, the Ninth Circuit approved secretarial regulations imposing a moratorium on commercial fishing on the Hoopa Valley Reservation. The court held that the Secretary was authorized to issue the regulations pursuant to the preexisting fishing rights that were granted when Congress authorized creation of the Hoopa Valley Reservation by statute. See People v. McCovey, 685 P.2d 687, 697 (Cal. 1984) (citing Menominee Tribe v. United States, 391 U.S. 404, 405-06, 88 S. Ct. 1705, 1707 (1968)). In similar fashion, the caselaw

overwhelmingly confirms that sections 2 and 9 do not empower issuance of regulations without a statutory antecedent. See, e.g., Washington v. Wash. State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658, 691, 99 S. Ct. 3055, 3077 (1979) (sections 2 and 9 effectuate rights granted by treaty); N. Arapahoe Tribe, 808 F.2d at 749 (general trust statutes "together with the Treaty . . . provide the necessary authority for the Secretary to enact these regulations."); United States v. Michigan, 623 F.2d 448, 450 (6th Cir. 1980) (upholding secretarial regulations governing rights conferred by treaty).[19]

IGRA, however, does not guarantee an Indian

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[19] In addition to the requirement that the regulations be issued in accordance with the rights conferred on the tribe by existing federal legislation, here, IGRA courts have recognized that sections 2 and 9 address the protection and management of "Indian trust resources" – typically natural resources or property. See, e.g., Washington v. Wash. State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658, 99 S. Ct. 3055 (1979) (fishing rights); Chippewa Indians of Minn. v. United States, 301 U.S. 358, 57 S. Ct. 826 (1937) (land allotment); Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy, 898 F.2d 1410 (9th Cir. 1990) (fisheries preservation); N. Arapahoe Tribe v. Hodel, 808 F.2d 741 (10th Cir. 1987) (hunting and fishing rights); see also Morton v. Ruiz, 415 U.S. 199, 94 S. Ct. 1055 (1974) (payment of general assistance benefits authorized under 25 U.S.C. § 13); Seminole Nation v. United States, 316 U.S. 286, 62 S. Ct. 1049 (1942) (money held in trust by the United States). Appellees' assertion that sections 2 and 9 apply here assumes that anticipated gambling revenues constitute an Indian trust resource within the meaning of those statutes. This assertion is especially unjustified since, under IGRA, after a tribal-state compact is in place the Secretary has no role whatsoever in the management or oversight of Class III gaming. See 25 U.S.C. § 2710(d)(5).

tribe the right to conduct Class III gaming and therefore cannot serve as a statutory antecedent justifying the Secretarial Procedures. IGRA grants tribes the right to negotiate the terms of a tribal-state compact, see 25 U.S.C. § 2710(d)(3)(A), and by agreement to "regulate class III gaming on its Indian lands concurrently with the State." § 2710(d)(5). Tribes, likewise, have the right to bring suit against a state for its failure "to enter into negotiations with the Indian tribe." See § 2710(d)(7)(A)(i). Seminole Tribe, of course, clarified that the tribe's right is subject to the state's exercise of an affirmative jurisdictional defense under the Eleventh Amendment. In any case, the Secretary's acting under sections 2 and 9 cannot sidestep IGRA's remedial process for two reasons. First, there would have been no reason for IGRA to prescribe any procedures had Congress been willing to or believed it could entrust them entirely to the Secretary's general powers. Second, the fact that IGRA clearly limited the Secretary's intervention into Class III gaming compacts constitutes the best evidence of congressional intent to limit the Secretary's role.

IV. CONCLUSION

The Secretarial Procedures violate the unambiguous language of IGRA and congressional intent by bypassing the neutral judicial process that centrally protects the state's role in authorizing tribal Class III gaming. Congress, to be sure, could omit states entirely from Class III gaming regulation. See Cabazon Band, 480 U.S. at 207, 107 S. Ct. at 1087. But we need not speculate on legislative alternatives that Congress might adopt in response to Seminole Tribe. Suffice it here to say that the balance Congress

did strike cannot be wholly revised by substitute procedures that contradict Congress's explicit statutory instructions. The Secretarial Procedures are invalid and constitute an unreasonable interpretation of IGRA. When, as here, "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43, 104 S. Ct. at 2781.

Pursuant to the foregoing discussion, we REVERSE the district court's judgment and REMAND for further proceedings consistent with this opinion.

REVERSED and REMANDED.

KING, Circuit Judge, concurring in part and in the judgment:

I concur in Part III.A of the opinion, which deals with justiciability. On the merits, I concur only in the judgment, reversing the district court's conclusion that the Secretary of the Interior ("Secretary") had the authority to promulgate the challenged regulations.

In my view, the lack of any provision in the Indian Gaming Regulatory Act ("IGRA") addressing the dismissal of an Indian tribe's enforcement suit on sovereign immunity grounds is a statutory gap that is akin to the gap recognized in *Pittston Co. v. United States*, 368 F.3d 385, 403-04 (4th Cir. 2004), and *Sidney Coal Co. v. Social Security Administration*, 427 F.3d 336, 346 (6th Cir. 2005). Those cases held that the Social Security Commissioner had implicit authority to fill a gap exposed by the Supreme Court's invalidation of a portion of the Coal Industry Retiree Health Benefit Act of 1992; in this case the Secretary's general authority to effectuate statutes relating to Indian affairs provides analogous gap-filling power with regard to IGRA. *See* 25 U.S.C. §§ 2, 9; *Morton v. Ruiz*, 415 U.S. 199, 231 (1974); *Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962).

However, the Secretary's authority to effectuate IGRA's provisions does not include the power to jettison some of those provisions in the cause of gap-filling, regardless of whether they no longer seem wise or appropriate in light of events that Congress did not foresee. In my opinion, the

method used by the Secretary to fill the gap here—creating an alternative remedial scheme that allows the Secretary to issue Class III gaming procedures without Congress's chosen prerequisites of a court determination of a state's bad faith and court-directed mediation, *see* 25 U.S.C. § 2710(d)(7)—goes beyond the mere effectuation of IGRA's provisions into the realm of wholesale statutory amendment. *Cf. Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) ("*Chevron* deference . . . is not accorded merely because the statute is ambiguous . . . . To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official."). By omitting those prerequisites, though for understandable reasons, the Secretary's method fails to preserve the core safeguards by which state interests are protected in Congress's "carefully crafted and intricate remedial scheme." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73-74 (1996); *cf. Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002) (invalidating an administrator's remedial regulation that "worked an end run around important limitations of the [relevant] statute's remedial scheme" by allowing a penalty to be imposed without the threshold court determination provided for by the statute). And despite a state's unforeseen and unintended ability to prevent the necessary court involvement from occurring, the Secretary "has no power to correct flaws that [he] perceives in the statute [he] is empowered to administer. [His] rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute." *Bd. of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986).

Today's decision returns IGRA's Class III gaming system to the complicated situation that existed after the Supreme Court's decision in *Seminole Tribe*, with a state having the leverage to block gaming on Indian land under IGRA in a manner wholly contrary to Congress's intent. Alternatively, one could argue that a tribe dealing with a state that will not negotiate or consent to an enforcement suit is no longer bound by IGRA's prohibition on gaming without a compact, depending on the circumstances. *See, e.g., United States v. Spokane Tribe of Indians*, 139 F.3d 1297 (9th Cir. 1998). We do not resolve these difficulties here, as they are not before this court. But because neither result is consistent with IGRA's design, the situation clearly calls for congressional action.

DENNIS, Circuit Judge, dissenting.

I.

The State of Texas permits certain types of gaming equivalent to Class III gaming as defined by the IGRA. But Texas adamantly refuses to negotiate with the Kickapoo Traditional Tribe towards a Class III gaming compact under the IGRA and has blocked the tribe from seeking a remedy in federal court by invoking its right to Eleventh Amendment sovereign immunity from suit. Therefore, the Tribe pursued its only alternate remedy of asking the Secretary of the Interior to issue Class III gaming procedures under the Secretarial Gaming Procedures, 25 C.F.R. §§ 291.1-291.15. The Secretary requested comment from the State of Texas pursuant to 25 C.F.R. § 291.7, but the state declined to comment. The Secretary has not yet taken final action on the Tribe's proposal.

The State of Texas brought this action against the Secretary, the Department of the Interior and the United States challenging the authority of the Secretary to promulgate the Secretarial Gaming Procedures regulations and seeking to permanently enjoin the application of 25 C.F.R. § 291.1, et seq., in respect to the state of Texas. The Kickapoo Traditional Tribe intervened. The district court ruled that Texas's claims were not ripe, but expressed its opinion that the regulations were validly promulgated and should be upheld. Texas v. United States, 362 F. Supp.2d 765 (W.D. Tex. 2004). Texas appealed. The defendants-appellees and the intervener contend that Texas's suit should be dismissed because it lacks standing, its claim is not ripe, and the Secretarial Gaming Procedures regulations are valid. I pretermit the serious standing and ripeness issues but dissent from the merits of Chief Judge Jones' opinion, portions of Judge King's opinion, and the judgment for the following reasons.

II.

The principles governing our review of the Secretary's interpretation and implementation of the pertinent statutes are well established. Administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. United States v. Mead Corp., 533 U.S. 218 (2001); see also Chevron, U.S.A., Inc. v. Natural Res.

Def. Council, Inc., 467 U.S. 837 (1984). Congressional delegation to an administrative agency of authority generally to make rules carrying the force of law may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rule-making, or by some other indication of a comparable congressional intent. Mead, 533 U.S. at 227.

When Congress has explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. Id. Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. Id. "The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Morton v. Ruiz, 415 U.S. 199, 231-32 (1974).

When circumstances imply that Congress would expect an agency to be able to speak with the force of law, even though Congress may not have expressly delegated authority or responsibility to implement a particular provision, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, and instead is

obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable. Id. at 229.

III.

The regulations challenged here, pertaining to the Secretarial Gaming Procedures, deserve Chevron deference because Congress explicitly authorized the Secretary to promulgate regulations to carry into effect any statute relating to Indian affairs or arising out of Indian relations, see 25 U.S.C. §§ 1a, 2 & 9; and implicitly authorized the Secretary to promulgate the regulations at issue here to fill the gap in the IGRA created by Congress's unintentional failure to provide for the unforeseen ineffectiveness of a federal court suit as the tribal remedy in cases in which a state refused to bargain in good faith and invoked its Eleventh Amendment sovereign immunity; the regulations are reasonably designed and appropriate for carrying into effect the IGRA after the ineffectiveness of its remedial provision was revealed by Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); and the regulations are binding in the courts because they are not procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statutes.

Beginning in 1832 and 1834, Congress explicitly authorized the President through the Secretary of the Interior to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs," 25 U.S.C. § 9; and to authorize the Commissioner of Indian affairs to, "under the

direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2.[1] Acting pursuant to these broad powers, the Secretary has, following formal notice-and-comment rule-making procedures, promulgated procedures governing numerous programs and activities related to Indian affairs and relations.

Prior to the enactment of the IGRA, states generally were precluded from any regulation of gaming on Indian reservations. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). The IGRA, by offering states an opportunity to participate with Indian tribes in establishing gaming through a tribal-state compact, "extend[ed] to the States a power withheld from them by the Constitution." Seminole, 517 U.S. at 58. Consequently, it is clear that before the enactment of the IGRA, the Secretary could have adopted, under 25 U.S.C. §§ 1a, 2, & 9, regulations approving and governing gambling on Indian reservations to the extent it was not prohibited by general state laws.

Congress's enactment of the IGRA in 1988 did not in any way diminish the broad powers of the President or the Secretary to "prescribe such regulations as he may think fit for carrying into effect ... any act relating to Indian affairs ... or [management of] matters arising out of Indian relations." See 25 U.S.C. §§ 2 & 9. When the Supreme

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[1] See Morton v. Ruiz, 415 U.S. 199 (1974); see also 25 U.S.C. § 1a.

Court subsequently held in Seminole that Congress is not authorized by the Indian commerce clause to abrogate a state's Eleventh Amendment sovereign immunity, this unforeseen event disclosed the ineffectiveness of the remedy Congress had granted tribes in the IGRA to sue recalcitrant states in federal court. The immediate result was that states could, as Texas has done, refuse to bargain and invoke sovereign immunity against a tribe's federal court remedy. This revealed that after Seminole the tribes had no remedy to enforce the IGRA, a gap in the statute that Congress had not anticipated and had unintentionally failed to provide for. Under these circumstances, it became the Secretary's clear duty to use his broad rule-making powers under 25 U.S.C. §§ 1a, 2 and 9 to provide alternate remedies and procedures necessary to carry the IGRA into effect. Nothing in the IGRA or its legislative history indicates an intention to prevent the Secretary from retaining and putting his broad rulemaking powers to this use.

The purpose of the IGRA is not simply to establish a neutral bargaining forum; IGRA's purpose is to affirmatively help Indian tribes enter and conduct the business of gaming, where gaming is not prohibited by state laws of general application, as a means of "promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). The IGRA federal court action remedy was "designed to ensure the formation of a Tribal-State compact." Seminole, 517 U.S. at 49-50. Because this remedy has been shown to be inoperative by Seminole, the Secretary's Gaming Procedures are consistent with the purpose and

provisions of the IGRA and are the most reasonable regulations that could be administratively prescribed to carry the IGRA into effect.

IV.

With respect, there is no valid basis for Chief Judge Jones's assertion that a judicial interpretation of a statute cannot lead to an ambiguity, gap or unprovided for case susceptible to the Chevron step-two analysis. To the contrary, there is no other way for a court to identify a statutory ambiguity or gap than through the process of judicial interpretation.

The argument that a court decision "creates" a gap is based on a theory inconsistent with the common-law tradition of the federal courts. The prevailing view is that the judicial power vested in the federal courts allows them to declare what the law already is, rather than to create new law as the Chief Judge's argument presupposes that the Court did in Seminole. See American Trucking Associations, Inc. v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in judgment); Linkletter v. Walker, 381 U.S. 618, 622-23 (1965). Under the prevailing Supreme Court view, the ambiguity or gap in the IGRA was created by the Congress when it unintentionally chose and enacted a constitutionally ineffectual tribal remedy, and not by the Court in the Seminole decision. The Supreme Court's principles governing retroactive application of its decisions reflect this view: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of

whether such events predate or postdate our announcement of the rule." Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993).[2] Under prevailing Supreme Court theory, the Seminole decision is and always was the law. The Supreme Court does not create law, it discovers it - and the Supreme Court did not create the gap in this case, but merely declared its existence. Congress itself created the gap or ambiguity by mistakenly overestimating its powers and passing a statute that could not be constitutionally applied as Congress intended.

The claim that a Chevron gap does not exist when a judicial decision has demonstrated an ambiguity in the statute has been emphatically rejected by other courts. In A.T. Massey Coal Co. v. Holland, 472 F.3d 148, 168 (4th Cir. 2006), the Fourth Circuit discussed a case in which a gap was "created when the Supreme Court found a portion of [a] provision unconstitutional." It held that "[o]nce that gap was created, the agency was left with an open policy space, which was the quintessence of legislative-type action to which Chevron deference was due." Id. In another case, Pittston Co. v. United States, 368 F.3d 385, 403-04 (4th Cir. 2004), the Fourth Circuit considered a gap disclosed by a judicial decision holding a portion of the Coal Act to be unconstitutional:

In drafting the Coal Act, Congress did

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[2] For a full discussion of the history of the common law retroactivity principle and the Supreme Court's recent return to the traditional view that it discovers law, rather than makes it, see Hulin v. Fibreboard Corp., 178 F.3d 316, 329-33 (5th Cir. 1999).

> not contemplate that some members of the "signatory operators" group could not constitutionally be required to contribute to the Combined Fund. The situation faced by the Commissioner was thus the kind of "case unprovided for" that allows her to engage in gap-filling. See Barnhart v. Peabody Coal Co., 537 U.S. 149, 169 (2003).

Id. The Sixth Circuit agreed that a gap for Chevron purposes was created when a portion of the Coal Act proved to be unintentionally ineffective. Sidney Coal Co. v. Soc. Sec. Admin., 427 F.3d 336, 346 (6th Cir. 2005) (holding that a gap existed because "the Coal Act contains no language as to how the SSA should have handled the precise question raised by the Eastern Enterprises holding").

Chief Judge Jones's attempt to distinguish these cases is unpersuasive and circular. She contends that because Congress must be able to foresee each gap and each agency rule chosen to fill it, the Secretary's remedial scheme here to fill the gap exceeds the scope of the authority delegated by Congress; so that, the gap created by judicial decision recognized in Pittson and A.T. Massey could not have existed in the first place. This is a tortured logic that conflates two fundamentally distinct questions: was there a gap or ambiguity, and if so, did the Secretary exceed its authority in attempting to fill it?

Contrary to the suggestion of Chief Judge Jones, the language of Chevron does not require that Congress must be able to envision a future gap or

ambiguity and the particular provision that the agency may choose to fill it or clarify it before it can come within the scope of the agency's implicitly authorized rulemaking. "[I]t can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which Congress did not actually have an intent as to a particular result." Mead, 533 at 229 (quotations omitted) (emphasis added). Congress may "create" a gap by explicitly delegating a question of interpretation to an agency; Chevron, 467 U.S. at 843-44; by implicitly doing so; id. at 844; or by simply remaining silent "with respect to the specific issue;" id. at 843. It is inherent in the policymaking process that some unforeseen event, or "case unprovided for," could render a portion of a statute ambiguous or meaningless. See Barnhart v. Peabody Coal Co., 537 U.S. 149, 169 (2003). The Ninth Circuit best described the situation that confronted the Secretary and now confronts us:

> We are left, then, with a tribe that believes it has followed IGRA faithfully and has no legal recourse against a state that allegedly hasn't bargained in good faith. Congress did not intentionally create this situation and would not have countenanced it had it known then what we know now.

United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1302 (9th Cir. 1998). There is no support for

the suggestion that Congress cannot, through its unintentional silence, create a gap or an ambiguity concerning how to enforce the IGRA after a portion of it, the sole tribal remedy originally chosen, has been invalidated.

V.

Chief Judge Jones further errs in contending that there has been no explicit or implicit congressional delegation of authority to the Secretary of the Interior to promulgate gap-filling regulations under the IGRA. Contrary to her assertions, the Secretary does not hang his hat on a mere failure of Congress to expressly withhold a delegation of agency authority. Rather, the Secretary of the Interior is the agency Congress would have expected to fill any such gap, given the powers granted to it under the IGRA and its general authority statutes. Chief Judge Jones focuses narrowly on the particular IGRA provision at issue here, relying conclusively on the fact that the IGRA itself does not contain an express delegation of agency authority to provide an alternate tribal remedy. The Supreme Court, by contrast, has instructed us to broaden our inquiry outside of the particular provision we are reviewing to include all statutes and circumstances pertaining to the agency's powers:

> Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress

> would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable....

Mead, 533 U.S. at 229 (internal citations omitted). Instead of inquiring into whether Congress would have expected the Secretary of the Interior to address any ambiguities in the IGRA, Chief Judge Jones focuses on whether the particular IGRA statutory provision at issue included a delegation of authority to the Secretary - an analysis that is both contrary to the Supreme Court's admonition in Mead and that would impose an impractical burden on Congress of including express delegations of an agency's authority to administer every provision of every statute under its aegis.

Chief Judge Jones's analysis of the general authority statutes and the IGRA itself is similarly unpersuasive. Her opinion rejects the significance of

25 U.S.C. §§ 2 & 9, the general authority statutes for the Department of the Interior, based on a misplaced reliance on the Supreme Court's decision in Organized Village of Kake v. Egan. 369 U.S. 60 (1962). Kake is a weak authority for her position for several reasons. Even if it made the sweeping holdings Chief Judge Jones attributes to it, the case was decided in 1963 and did not conduct the modern analysis required by more recent cases such as Chevron and Mead. A greater difficulty for Chief Judge Jones is that while it does indeed include language to the effect that these sections do not grant the Interior "a general power to make rules governing Indian conduct," that language was not the holding of the court in that case. That language was, instead, a quotation from an Interior Department Handbook, and was not expressly adopted by the Court. The Court's actual legal holding with respect to the scope of the general authority statutes was confined to a single sentence: "We agree that they do not support the fish-trap regulations." Kake. 369 U.S. at 63. Most significantly, in Kake the Court was analyzing a situation in which other Congressional legislation, the White Act, had expressly narrowed the authority of the Secretary of the Interior under 25 U.S.C. §§ 2 and 9 in the specific area in which he attempted to act. Id. at 62-63. It was also plain that, unlike in this case, there was no underlying statute being enforced and the Secretary was not attempting to "implement specific laws" - a power the Handbook referenced by the Supreme Court in Kake concluded was granted to Interior under the general authority statutes. Id.

Chief Judge Jones's reliance on United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986), similarly

distorts the actual holding of the case. Her opinion omits that court's holding that "the general trust statutes in Title 25 do furnish Interior with broad authority to supervise and manage Indian affairs and property commensurate with the trust obligations of the United States." Id. at 1360. In distinguishing Kake and concluding that the general authority statutes were broad in scope, the Eberhardt court added that "Congress must be assumed to have given Interior reasonable power to discharge its broad responsibilities for the management of Indian affairs effectively." Id. at 1361.

Chief Judge Jones's opinion further avoids referencing other cases that have also come to the conclusion that the Secretary of the Interior has comprehensive powers under the general authority statutes to effectuate other Indian-related legislation. The D.C. Circuit, from which her opinion eagerly borrows in other sections, emphatically disagrees with a cramped view of the general authority statutes such as hers. That court described the powers of the Secretary of the Interior under the general authority statutes as follows:

> In charging the Secretary with broad responsibility for the welfare of Indian tribes, Congress must be assumed to have given him reasonable powers to discharge it effectively. Courts have taken this approach with respect to various aspects of Indian life, recognizing that '[this] statute furnishes broad authority for the supervision and

> management of Indian affairs and property commensurate with the obligation of the United States.'
>
> In our opinion the very general language of the statutes makes it quite plain that the authority conferred upon the Commissioner of Indian Affairs was intended to be sufficiently comprehensive to enable him, agreeably to the laws of Congress and to the supervision of the President and the Secretary of the Interior, to manage all Indian affairs, and all matters arising out of Indian relations, with a just regard, not merely to the rights and welfare of the public, but also to the rights and welfare of the Indians, and to the duty of care and protection owing to them by reason of their state of dependency and tutelage.

Udall v. Littell, 366 F.2d 668, 672-73 (D.C. Cir. 1966) (internal citations and footnotes omitted). Other circuits have agreed that the Secretary's powers to promulgate regulations to effectuate all Indian-related statues are broad in scope. See Armstrong v. United States, 306 F.2d 520, 522 (10th Cir. 1962) ("This statute furnishes broad authority for the supervision and management of Indian affairs and property commensurate with the obligation of the United States.").

Inexplicably, the Chief Judge's opinion fails to acknowledge that, subsequent to Kake, the Supreme

Court in Morton v. Ruiz, in articulating the keystone to the Chevron doctrine, simultaneously recognized that Congress intended for the Secretary of the Interior to play a major policy-making, rule-making, and gap-filling role in effectuating its Indian-related statutes. The Court plainly rejected an impracticably constrained view of the Secretary's powers in stating:

> The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary and his delegates at the BIA.

415 U.S. at 231-32 (footnotes citing and quoting 25 U.S.C. §§ 2 & 9 as authority omitted).

Pursuant to its general authority under 25 U.S.C. §§ 2 & 9, recognized so clearly by Morton v. Ruiz and later built upon in Chevron, the Secretary of the Interior has successfully promulgated regulations governing activities across the spectrum of Indian affairs. See 25 C.F.R. § 23.1 (regulating child and family service programs under the Indian Child Welfare Act); 25 C.F.R. § 89.30 (approval of legal contracts with certain tribes); 25 C.F.R. § 166.1 (imposing grazing restrictions on tribal lands); 25 C.F.R. § 241.1 (regulating fishing on certain reservations); 25 C.F.R. § 150.1 (regulating the

recording, certification, and use of title documents on tribal lands); 25 C.F.R. § 61.1 (regulating the management of rolls and membership lists of Indian tribes); 25 C.F.R. § 83.1 (establishing procedures for determining whether a group constitutes an Indian tribe).

Chief Judge Jones is further incorrect in suggesting that there is no "statutory antecedent" to support the Secretary's regulations at issue here under the general authority statutes. The short answer to Chief Judge Jones's suggested complaint, of course, is that there is an obvious "statutory antecedent" here - the IGRA itself, which clearly evinces Congress's intent to empower the Secretary to authorize Indians to conduct gaming businesses on tribal reservations where not prohibited by general state laws and after giving states a full and fair opportunity to bargain in good faith over the specific terms of the individual tribal gaming regulations. It turns out, however, that her argument in this respect is simply another version of her argument against implicit agency authority, diametrically contrary to Chevron and Mead, to the effect that each separate Indian-related statute must explicitly authorize the Secretary to carry it into effect, i.e., that the general authority statutes alone do not really do what they purport to — empower the Secretary to prescribe regulations to effectuate subsequent Indian-related statutes. The cases upon which the Chief Judge relies, again, however, do not see her argument through. In the final analysis, they stand only for the simple proposition that in order for the Secretary to use his general authority under 25 U.S.C. §§2 and 9 to prescribe regulations to carry a subsequent statute

into effect, there must first be a statute or a treaty to effectuate. See N. Arapahoe Tribe v.Hodel, 808 F.2d 741, 745-46 (10th Cir. 1987) (holding that 25 U.S.C. § 9 could not be applied unless it was to carry "into effect the various provisions of any act relating to Indian affairs," but that a treaty could in effect substitute for an act or statute); United States v. Michigan, 623 F.2d 448, 450 (6th Cir. 1980) (holding only that the requirement is not a difficult one to meet and that a treaty can substitute for an "act relating to Indian affairs"). The Chief Judge's opinion plays a linguistic game, using the phrase "statutory antecedent" to suggest that there must be some specific provision in every Indian-related statute granting the authority to invoke sections 2 and 9 - when, in fact, the courts have only logically required that some sort of statute or law related to Indian affairs be extant before the Secretary can prescribe regulations to carry it into effect. In other words, when Congress enacts a statute pertaining to Indian affairs and relations, but not before, it becomes the duty of the President and the Secretary to exercise their powers under 25 U.S.C. § 2 & 9 to promulgate rules necessary to give it effect. Ruiz, 415 U.S. at 231.

Chief Judge Jones's further assertion that "the fact that IGRA clearly limited the Secretary's intervention into Class III gaming compacts constitutes the best evidence of congressional intent to limit the Secretary's role" ignores the reality of the situation here: that Congress enacted the statute without foreknowledge of the Supreme Court's decision in Seminole. That Congress did not contemplate a need for the Secretary to prescribe an alternate tribal remedy to fill a gap is merely a

function of Congress's failure to foresee the gap it was leaving, i.e., Congress did not foresee that it lacked power under the Indian commerce clause to abrogate state sovereign immunity and that, therefore, its own statutorily prescribed tribal remedy of a federal court suit would prove to be ineffectual. Congress's lack of foreknowledge that the IGRA would prove to be devoid of any constitutionally effective tribal remedy does not suggest in the slightest that Congress anticipated or intended that the Secretary would default in his duty to prescribe an alternate remedial procedure to carry the IGRA into effect.

As with the general authority statutes, the role of the Interior under the specific delegations of authority under the IGRA is far broader than what Chief Judge Jones's opinion, focused as it is on a narrow section of the law, admits. The IGRA authorizes the Secretary to approve or disapprove Tribal-State compacts according to whether a compact complies with or violates the IGRA, federal law or "the trust obligations of the United States to Indians." 25 U.S.C. § 2710(d)(8)(B). Further, the IGRA specifically provides that "[i]f the State does not consent ... to a proposed compact submitted by a mediator ..., the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures ... which are consistent with ... the relevant provisions of the laws of the State...." 25 U.S.C. § 2710(d)(7)(B)(vii) (emphasis added) Thus, the IGRA contemplates that the Secretary of the Interior, and not the federal or state courts or a mediator, shall perform the task of interpreting state and federal laws and treaties to

assure that a proposal or compact for Indian gaming complies with them. Additionally, the Secretary is given powers to review and approve or disapprove any plans by tribes to distribute revenue from gaming to members of a tribe, and to evaluate such plans for whether they comply with the IGRA's goal of tribal economic development. See 25 U.S.C. § 2710(b)(3)(B).

Moreover, a number of regulatory powers are delegated to the Secretary of the Interior through the National Indian Gaming Commission ("NIGC"), a three-member body within the Department of the Interior. Tamiami Partners v. Miccosukee Tribe of Indians, 63 F.3d 1030, 1048 (11th Cir. 1995); Seneca-Cayuga Tribe v. Nat'l Indian Gaming Comm'n, 327 F.3d 1019, 1023 (10th Cir. 2003). Two of the three members of the NIGC are appointed directly by the Secretary of the Interior. Tamiami, 63 F.3d at 1048. Congress plainly intends the Department of the Interior to have broad authority over gaming in enacting the IGRA, delegating to the NIGC the power to close an Indian gaming facility permanently, to adopt regulations governing fines, to issue subpoenas, to inspect the books and records of a Class II gaming facility, and to hold hearings. Id. The NIGC is required to "monitor class II gaming continuously, inspect class II gaming premises, promulgate regulations necessary to implement IGRA, and conduct background investigations of, among others, management contractors." Id. While the NIGC is technically a distinct entity within the Department of the Interior, the Secretary retains majority control over the board by appointing two of its members. It is plain that the nominal separation of the two does not

change the clear intent of Congress to locate rulemaking and administrative authority under the IGRA with the Secretary of the Interior. Indeed, after the Tenth Circuit attempted to restrict the powers of the Interior by holding that the IGRA delegated determinations of what constituted a reservation to the NIGC, Sac & Fox Nation of Missouri v. Norton, 240 F.3d 1250 (10th Cir. 2001), Congress immediately corrected the court and clarified that the Secretary of the Interior holds this power. City of Roseville v. Norton, 348 F.3d 1020, 1029-30 (D.C. Cir. 2003); Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, § 134 (2001).

In view of all of the foregoing, it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law" with respect to any gaps or ambiguities in the IGRA. Mead, 533 U.S. at 229. Chief Judge Jones's contention to the contrary is based on a narrow reading of a particular statutory provision, exactly the kind of analysis forbidden by the Supreme Court. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) (holding that "a reviewing court should not confine itself to examining a particular statutory provision in isolation").

VI.

Chief Judge Jones also incorrectly maintains that, under step two of the Chevron analysis, the Secretarial Procedures regulations do not reasonably effectuate Congressional intent with respect to the IGRA. Contrary to the suggestion of Chief Judge

Jones's opinion, the Secretary's regulations are not only consistent with the intentions of Congress but are necessary to achieve the intended "finely-tuned balance" that Seminole revealed Congress had unintentionally failed to provide.

The IGRA was enacted with more than the interests of the states in mind. It was enacted "in large part to 'provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.'" TOMAC, Taxpayers of Mich. Against Casinos v. Norton, 433 F.3d 852, 865 (D.C. Cir. 2006) (quoting 25 U.S.C. § 2702(1)). It was also designed to ensure that a tribe was the primary beneficiary of any gaming operations. Citizens Exposing Truth About Casinos v. Kempthorne, ___ F.3d ___, No. 06-5354, 2007 WL 1892080, at *1 (D.C. Cir. Jul. 3, 2007). "IGRA was designed primarily to establish a legal basis for Indian gaming as part of fostering tribal economic self-sufficiency, not to respond to community concerns about casinos...." Id. at *10; San Manuel Indian Bingo and Casino v. N.L.R.B., 475 F.3d 1306, 1308 (D.C. Cir. 2007) (holding that the purpose of the IGRA was to ensure economic development and self-sufficiency of Indian tribes through gaming).

While Congress did, as Chief Judge Jones asserts, intend that the mechanism to introduce gaming would be a tribal-state compact, it did not intend to allow, as the Seminole-blunted statute does, a situation in which states could refuse to negotiate and thus veto a tribal-state compact. Under the IGRA as passed by Congress, a state that failed to act in

good faith, as Texas indisputably has here, could be sued in federal court. 25 U.S.C. § 2710(d)(7) That state would have the burden of proving that it negotiated in good faith. Id. at 2710(7)(B)(ii). If the state failed to meet its burden of proof, it would have been ordered to negotiate a compact within 60 days. Id. at 2710(7)(B)(iii). If the state continued to refuse to compact, it would have been forced into mediation. Id. at 2710(7)(B)(iv). If the state ultimately refused to consent to the results of the mediation, the Secretary of the Interior was empowered to bypass the state and create its own procedures authorizing gambling by the tribe, consistent with the compact proposed during mediation. Id. at 2710(7)(B)(vii).

It was thus not just the existence of a compact that was crucial to the balance between states and tribes under the IGRA. "It is quite clear from the structure of the statute that the tribe's right to sue the state is a key part of a carefully-crafted scheme balancing the interests of the tribes and the states. It therefore seems highly unlikely that Congress would have passed one part without the other, leaving the tribes essentially powerless." Spokane Tribe, 139 F.3d at 1300. The right to sue to essentially force a compact gave tribes a crucial piece of leverage against the states -preventing a state from taking the approach of Texas in this case, which has been to utterly refuse to negotiate. Prior to the promulgation of the Secretarial Procedures regulations, states had under Seminole's constitutional interpretation a veto over the tribal-state compact process. See Matthew L.M. Fletcher, Bringing Balance to Indian Gaming, 44 HARV. J. ON LEGIS. 39, 75 (2007) (describing the stalemate resulting from the elimination of

Congress's intended remedy for tribes faced with a state refusing to negotiate). "Congress did not intentionally create this situation and would not have countenanced it had it known then what we know now." Spokane Tribe, 139 F.3d at 1302.

Chief Judge Jones's opinion gives lip-service to the deference accorded under Chevron at step two to the Secretary's Procedures regulations, noting correctly that we may not disturb the agency's decision "unless it appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned." Chevron, 467 U.S. at 845. We do not ask whether the Procedures regulations are ideal, or whether there is some way they can be improved. Mead, 533 U.S. at 229 (holding that "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise"). We do not ask whether Congress would have modified them in some minor way. We ask only whether they were reasonable and whether Congress would have sanctioned them. Chevron, 467 U.S. at 845. To focus on the minutiae, as Chief Judge Jones's opinion does, distracts from the general intentions of Congress in passing the IGRA: Congress intended to allow Indian gaming to proceed, for the purpose of economically benefitting Indian tribes, after a negotiating process that would give states a right to negotiate towards the ultimate outcome. In the case of a state that attempted to halt or veto this process without good faith, Congress intended that tribes would ultimately be able to force gaming even over the objections of the state. The Secretary's

regulations at issue here may not be perfect, but by allowing tribes an alternate process to propose gaming procedures in cases where a state refuses to negotiate and refuses to be sued in federal court, they closely approximate what Congress likely would have intended, while the status quo after Seminole undisputedly subverts the national legislative aims in respect to Indian affairs and relations.

Even on its discussion of the details, Chief Judge Jones's opinion is misguided. It first argues that the Procedures are unreasonable because they eliminate the requirement that a federal court determine whether the state has negotiated in good faith. But this criticism based on the idea that the Secretary's regulations deny the State of Texas access to an impartial federal court fact-finder rings hollow given that the Secretary's alternate remedy regulations are triggered only if the state has asserted its Eleventh Amendment right not to be sued in federal court by an Indian tribe under the original statutory procedures enacted by Congress. 25 C.F.R. § 291.3. Under the Secretary's alternate remedy regulations, a state that prefers that a federal court resolve its dispute with the tribe may simply choose that option, waiving its objection to federal jurisdiction and proceeding exactly as Congress originally intended. The State of Texas, after categorically refusing to negotiate with the Kickapoo and after asserting its sovereign immunity in federal court when the Kickapoo attempted to invoke the original statutory procedures, now resorts to a federal court complaining that it is crucial that a federal court serve as an independent body to determine whether its absolute refusal to negotiate

constituted "negotiations in good faith." The Procedures do not deny a state its right to a judicial determination as to whether it acted in good faith, because the state may choose to submit to a federal court's jurisdiction by allowing a tribe to sue it there; just as it has in the present case by bringing this suit in federal court. That Texas is well aware that a fair and impartial federal court would be unlikely to find that its utter refusal to negotiate amounted to good-faith bargaining does not obviate its undisputed right to litigate that matter in federal court.

Moreover, Congress contemplated the "good faith" determination as an affirmative defense, with the burden on the state to prove that it negotiated in good faith. 25 U.S.C. § 2710(d)(7)(B)(ii). The Secretary's alternate tribal remedy regulations require that the tribe has negotiated with a state for a six-month period prior to invoking the Secretarial Gaming Procedures. 25 C.F.R. § 291.3(b). A state must also have asserted its sovereign immunity defense against a suit by the tribe. Id. at 291.3(d). The Procedures give the state a 60-day comment period, and invite it to submit an alternate gaming proposal. Id. at 291.7(b). They invite the state to participate in an informal conference with the tribe. Id. at 291.8(b). Only after mediation may the Secretary attempt to actually impose a proposal over the state's objection. Id. at 291.11. It seems unlikely that a state, negotiating in good faith, would fully proceed through this process without coming to some agreement with the tribe. A good faith determination might improve these procedures from a policymaking perspective, but that question is not one for this court under Chevron. We ask only whether the Secretary's

regulations are reasonable and whether Congress would have sanctioned them -and it seems unlikely, given the Congressional goal of allowing and promoting lawful Indian gaming businesses, that Congress would not sanction these regulations closely tracking and complementing the original statute, rendered ineffective by Seminole, with an alternate remedy that is absolutely essential to its having the Congressional effect intended.

Chief Judge Jones's second contention is that the Secretarial Gaming Procedures regulations create a biased mediation process by allowing the Secretary of the Interior, rather than a court, to appoint a mediator who has "no official, financial, or personal conflict of interest with respect to the issues in controversy." 25 C.F.R. § 291.9(a). Chief Judge Jones's suggestion that the Interior is placed in the role of an "objective arbiter" is incorrect - instead, the person appointed as a mediator is the fair and impartial decider. Unfounded speculation that the Secretary might not perform his plain duty under the statutes and his own department's regulations to select a neutral mediator fails to justify a conclusion that the regulations are unreasonable - especially given that for Chief Judge Jones's fears to materialize, not only must the Secretary violate his duty, but the neutral mediator must as well.

Chief Judge Jones's third contention, that the Secretary is enabled to simply disregard the mediator's proposal, exaggerates the Secretary's powers under the Procedures. The Secretary may not establish his own procedures unless he does not approve the mediator's proposal. The Secretary may

not disapprove the mediator's proposal unless it violates federal or state law, violates the trust obligations to the tribe, or does not comply with the technical requirements of a proposal. 25 C.F.R. § 291.11. In the event that the Secretary disapproves, he may prescribe his own procedures - but only if they "comport with the mediator's selected proposal as much as possible...." Id. at 291.11(c). This differs only slightly from the statutory requirement that the procedures be "consistent with the proposed compact selected by the mediator...." 25 U.S.C. § 2710(d)(7)(B)(vii). Moreover, it is unclear which of the two is the more restrictive on the Secretary - and the regulations certainly do not grant "unbridled power to prescribe Class III regulations."

Chief Judge Jones's final argument combines her previous three into a grand petitio principii. That is, she begs the question by contending that Congress would not have expected the Secretary to fill the unforeseen gap it left in the IGRA's tribal remedy unless he included the requirements that made it unintentionally unenforceable in the first place---a federal court's determination of a state's failure to bargain in good faith, the participation of a federal court-appointed mediator, and gaming procedures consistent with a federal court-appointed mediator's proposed compact. Yet we are not inquiring into whether Congress "intended" or could foresee the result reached by the Secretary in filling Congress's own unforeseen and unintended gap. We instead ask whether the result is a reasonable one that Congress would sanction by the agency it had empowered to make rules and policies to effectuate its acts regarding Indian affairs and relations for purposes of

complementing or filling the gap in the statute. Chevron, 467 U.S. at 845. Congress intended for recalcitrant states to be subjected to suit by Indian tribes in federal court - but that intended tribal remedy was frustrated by the unforeseen constitutional interpretation in Seminole. I conclude that, if Congress had known that it lacked power to abrogate state sovereignty under the Indian commerce clause, it obviously would have adopted at least some alternate form of remedy - and that it would likely have enacted something similar to the Secretarial Gaming Procedures regulations, as a reasonable and necessary alternate tribal remedy. Otherwise, if this reasonable and practicable proposition cannot be laid, we are faced with a preposterous alternative conclusion, viz., that Congress would have declined to adopt the IGRA in any form or would have included a veto power for hostile states in a statute designed "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[3] 25 U.S.C. § 270(1).

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[3] Chevron is not the only potential source of deference owed to the regulations. The Indian canon of construction provides that because of the trust relationship between the federal government and the tribes, statutes "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992) (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985)). The precise relationship between this canon of construction and the Chevron doctrine has not been resolved. Several circuits, however, have held that when the two principles of deference are in conflict, the Indian canon trumps the Chevron doctrine, requiring deference to the interpretation that is most favorable to

VII.

In sum, this reviewing court has no business rejecting the Secretary's exercise of his generally conferred authority to fill a particular statutory gap simply because it deems the Secretary's chosen resolution to be unwise, but instead is obliged to accept the Secretary's position because Congress has not spoken to the point or gap at issue here and the Secretary's interpretation is reasonable. Further, the circumstances here imply that Congress would expect the Secretary to be able to speak with the force of law, even though Congress may not have expressly delegated authority or responsibility to implement a particular provision; the power of an administrative agency to administer a congressionally created and

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the Indian tribes. See Scott C. Hall, The Indian Law Canons of Construction v. The Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem, 37 CONN. L. REV. 495 (2004); Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (holding that the Indian canon prevailed over the Chevron doctrine when the two were in conflict).

There is no need to ponder the precise relationship of the two principles in this case, however, because they are not in conflict but concurrently call for judicial deference toward the Secretary's gaming procedures regulations that are necessary to carry the IGRA into full effect. Thus, at a minimum, the Indian canon adds substantially to the level of deference owed to the Secretary's Procedures regulations in this case. Chief Judge Jones makes unwarranted assumptions about the intent of Congress that are not consistent with the obvious gap it unintentionally left in the IGRA along with the requirement that we generously construe any regulation by the Secretary to fill it in favor of the IGRA's effectuation, and with IGRA's furtherance of tribal economic development and self-sufficiency in light of Congress's unique trust relationship with the Indians.

funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. The Secretary therefore acted within his authority to promulgate regulations filling an unanticipated statutory gap under the explicit authority of 25 U.S.C. §§ 2 and 9 and the implicit authority of the IGRA, and his ensuing regulations are owed Chevron deference and are binding in the courts because they are not procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statutes. Accordingly, I DISSENT.

APPENDIX B: *Texas v. United States*, 362 F.Supp. 2d 765 (W.D. Tex. 2005)
(United States District Court – Opinion Below)

United States District Court, W.D. Texas, Austin Division.
State of TEXAS, Plaintiff,
v.
UNITED STATES of America, United States Department of the Interior, and Gale A. Norton in Her Official Capacity as Secretary of the Department of the Interior, Defendants,
v.
Kickapoo Traditional Tribe of Texas, Defendant-Intervenor.

Cause NO. A-04-CA-143-LY.

MEMORANDUM OPINION AND ORDER ON MOTIONS AND CROSS-MOTION

Before the Court are Plaintiff's Motion for Summary Judgment filed July 14, 2004 (Doc. # 46); United States Motion for Judgment on the Pleadings or in the Alternative Cross-Motion for Summary Judgment filed August 18, 2004 (Doc. # 48); Defendant-Intervenor's Response in Opposition to Plaintiff's Motion for Summary Judgment filed August 18, 2004 (Doc. # 49); Defendant-Intervenor's Motion to Dismiss, or in the Alternative for Summary Judgment filed August 18, 2004 (Doc. # 50); Plaintiff's Response to the United States' Motion for

Judgment on the Pleadings and Defendant-Intervenor's Motion to Dismiss filed August 27, 2004 (Doc. # 53); Plaintiff's Response to the United States Defendants' and Defendant-Intervenor's Motions for Summary Judgment filed August 27, 2004 (Doc. # 54); Defendant-Intervenor's Reply to Plaintiff's Response to Defendant-Intervenor's Motion to Dismiss and Motion for Summary Judgment filed September 7, 2004 (Doc. # 55); and United States' Combined Reply to Plaintiff's Response to United States Motion for Judgment on the Pleadings and Plaintiff's Response to United States Defendants' and Defendant-Intervenor's Motions for Summary Judgment filed September 7, 2004 (Doc. # 57). A hearing was held on the above-listed motions on October 26, 2004, at which the Court heard the arguments of counsel on all motions. After the hearing the parties filed with the Court the following additional documents: Plaintiff's Letter Brief filed November 5, 2004 (Doc. # 64); Defendant-Intervenor's Letter Brief filed November 9, 2004 (Doc. # 65); Defendant United States' Supplemental Brief filed November 12, 2004 (Doc. # 66); Defendant-Intervenor's Submission of Recently Decided Supplemental Authority filed December 1, 2004 (Doc. # 67); Plaintiff's Second Letter Brief filed December 6, 2004 (Doc. # 68); and Defendant-Intervenor's Letter Brief in Reply to Plaintiff's Second Letter Brief filed December 27, 2004 (Doc. # 71). Having reviewed the summary-judgment motions, responses, replies, and additional briefing, as well as all summary-judgment evidence submitted by the parties and the arguments of counsel at the hearing, the Court finds that although the State of Texas does have standing generally to bring its cause of action, its specific

claims are premature until a final decision is rendered by the Department of the Interior on whether the Kickapoo Traditional Tribe of Texas's application for Class III gaming would be consistent with Texas law and public policy.

I. Background

The following factual summary was provided in part by the parties' Joint Stipulations of Fact (Doc. # 47) filed July 14, 2004. The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§2701-21(2001), was enacted on October 17, 1988. By adopting IGRA, Congress preempted all other regulation of Indian gaming. *See* 25 U.S.C. §2702(3).

IGRA divides Indian gaming into three classes: "Class I games" (social games solely for prizes of minimal value or traditional forms of Indian gaming); "Class II games" (bingo, including pull-tabs, lotto, punch boards, tip jars, instant bingo, other games similar to bingo, and certain card games); and "Class III games" (all other gaming including roulette, blackjack, and parimutuel wagering). *See id.* § 2703(6)-(8). Class I games are not subject to regulation under IGRA. *Id.* §2710(a). Class II games are permitted on Indian lands under IGRA if the game is conducted within a state that permits Class II gaming "for any purpose by any person, organization or entity." *Id.* § 2710(b). Class III gaming activities are "lawful on Indian lands only if such activities are ... (A) authorized [by an approved Tribal] ordinance or resolution ..., (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and (C) conducted

in conformance with a Tribal-State compact... "*Id.*§ 2710(d)(Supp. 2004).

Known colloquially as a "cooperative federalism" statute, IGRA contemplates joint federal and state regulation. *See Artichoke Joe's California Grand Casino v. Norton*, 353 F. 3d 712, 715 (9th Cir. 2003). In order to engage in Class III gaming activities, an Indian tribe must "request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. §2710(d)(3)(a). The state must negotiate in good faith with the tribe upon receipt of such a request. *Id.*

The Kickapoo Traditional Tribe of Texas ("Kickapoo Tribe") is an Indian tribe recognized in IGRA "by the Secretary for the special programs and services" and as "possessing powers of self-government." *Id.* § 2703(5). In 1995 representatives of the Kickapoo Tribe met with the Governor of Texas's staff to discuss the possibility of negotiating a compact to conduct Class III gaming in Texas. When the State of Texas rejected the Kickapoo Tribe's offer to negotiate a compact, the Kickapoo Tribe filed suit on October 13, 1995, alleging that Texas failed to negotiate in good faith under IGRA. Before the lawsuit was concluded, however, the United States Supreme Court decided *Seminole Tribe of Florida v. Florida*, in which the Court held that the enactment of IGRA did not waive a state's Eleventh Amendment immunity. 517 U.S. 44, 72-73 (1996). In light of *Seminole Tribe*, Texas's motion to dismiss the Kickapoo Tribe's suit

was granted on April 2, 1996. *See* Order on Defendants' Motion to Dismiss, *Kickapoo Traditional Tribe of Texas v. State of Texas,* Cause No. P-95-CA-66 (W.D. TX April 2, 1996).

In May 1996, the United States Department of the Interior (the "Department") published an Advanced Notice of Proposed Rulemaking seeking "comment on its authority under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §2710, to promulgate 'procedures' to authorize Class III gaming on Indian lands when a State raises an Eleventh Amendment defense to an action brought against it pursuant to Section 11 of the Act, 25 U.S.C. §2710(d)(7)." 61 Fed. Reg. 21394 (May 10, 1996).[1] After the comment period expired, the Department issued a Proposed Rule for Class III Gaming Procedures on January 22, 1998. *See* 63 Fed. Reg. 3289 (Jan. 22, 1998). The Department sought further comment on the Proposed Rule, in response to which Texas submitted its objections. Once appropriations were made available in 1999, the Department was able to publish its Final Rule for Class III Gaming Procedures in April of that year. *See* 64 Fed. Reg. 175353 (Apr. 12, 1999) (codified at 25 C.F.R. Part 291) (the "Gaming Procedures" at issue in this case).

On December 11, 2003, the Kickapoo Tribe submitted its Class III gaming application to the

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[1] In November 1997, Congress adopted an amendment to the 1998 Interior Appropriations bill temporarily prohibiting the Secretary of the Interior from approving a compact that had not been approved by the state. *See* Pub. L. 105-83, §129 (1998).

Department. On January 12, 2004, the Secretary of the Interior, acting through the Acting Deputy Assistant Secretary of Policy and Economic Development, notified Texas and the Kickapoo Tribe that the Secretary had determined that the Kickapoo Tribe's proposal was complete and met the eligibility requirements of the Gaming Procedures. The Secretary invited Texas to comment on the proposal or to submit an alternative proposal.

On March 11, 2004, Texas filed its original complaint and an Application for Preliminary Injunction and for Stay of Administrative Proceedings seeking to have the Gaming Procedures declared invalid and seeking a stay of the application of those procedures to Texas pending this Court's review. A hearing was held before this Court on April 20, 2004, following which the Court denied Texas's application. Following the ruling, the parties filed the various motions and cross-motions for summary judgment, to dismiss, and for judgment on the pleadings discussed herein.

Texas's motion for summary judgment seeks a finding by the Court that the Gaming Procedures are in direct conflict with IGRA and therefore constitute an unconstitutional delegation of legislative authority to the Secretary and violate the separation-of-powers doctrine. Further, Texas seeks a finding that the Gaming Procedures vest the Secretary with judicial and legislative authority that conflicts with the Secretary's position as "trustee" for the Indian tribes under IGRA. In response, the Kickapoo Tribe asserts that Texas lacks standing to raise its claims and that its claims are not ripe for adjudication.

The United States' motion for judgment on the pleadings and cross-motion for summary judgment also raises the issue of standing because, the United States contends, there are no injuries and no final decision for Texas to challenge. In response, Texas argues that its injury is the loss of its right under IGRA to negotiate in good faith and not be subject to any remedial procedures.

II. Analysis

A. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *see* also *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). "If the moving party meets the initial burden of showing there is no genuine issue of material fact, the burden shifts to the nonmoving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." *Allen v. Rapides Parish Sch. Bd.*, 204 F.3d 619, 621 (5th Cir. 2000) (internal quotations and citations omitted). When both parties move for summary judgment, the court reviews each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party. *Ford Motor Co. v. Texas Dept. of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001) (citing *Taylor v. Gregg*, 36 F.3d 453, 455 (5th Cir. 1994). Doubts are to be resolved in favor of the

nonmoving party, and any reasonable inferences are to be drawn in favor of that party. *See Burch v. City of Nacogdoches*, 174 F.3d 615, 619 (5th Cir. 1999). However, "[n]either 'conclusory allegations' nor 'unsubstantiated assertions' will satisfy the non-movant's burden," *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996), and only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary judgment, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

B. The Gap Created by Seminole Tribe

In 1996 the Supreme Court held that an Indian tribe could not sue a state in federal court for failure to negotiate in good faith if the state asserted its Eleventh Amendment immunity from suit. *Seminole Tribe*, 517 U.S. 44, 76 (1996). As a result, the federal courts do not have jurisdiction over suits brought by Indian tribes against states under IGRA's cause-of-action provisions[2] if a state raises an Eleventh Amendment immunity defense. *Seminole Tribe* affirmed the Eleventh Circuit's holding that IGRA's provision allowing a tribe to sue an unconsenting state was unconstitutional. *See Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994). But the Eleventh Circuit also held that the Indian tribe retained a remedy through the Department's promulgation of procedures governing Class III gaming on tribal lands:

> If the state pleads an Eleventh

[2] 25 U.S.C. §§ 2710(d)(7)(A)(i), (B)(i) (2001)

> Amendment defense, the suit is dismissed, and the tribe pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary may then prescribe regulations governing class III gaming on the tribe's lands. This solution conforms with the IGRA and serves to achieve Congress' goals, as delineated in §§ 2701-02.

Id. Thus, the circuit court specifically found that the Class III provisions of IGRA could stand under a traditional severance analysis, as long as the procedures remedy was made available to the Indian tribe. *Id.*

The Supreme Court did not address the Eleventh Circuit's holding on this point, *see Seminole* Tribe, 517 U.S. at 76 n. 18, 116 S. Ct. 1114, expressly denying certiorari on the request to review that specific part of the circuit court's holding. *See Florida v. Seminole Tribe of Florida*, 517 U.S. 1133 (1996). The circuit court's decision thus opened a gap in the application of IGRA, creating an ambiguity to which the Department responded by promulgating the Gaming Procedures at issue in this case.[3] Because Congress does not speak directly to this issue under IGRA, this Court must determine if, under judicial principles regarding severance, the Secretary's

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[3] The Ninth Circuit has expressly reviewed and affirmed the saving construction in the Eleventh Circuit's *Seminole Tribe* decision. *See U.S. v. Spokane Tribe*, 139 F.3d 1297, 1301-02 (9th Cir.1998).

interpretation of her authority to promulgate the Gaming Procedures is reasonable.

When considering the validity of a statute following severance, the Supreme Court has held that the most relevant inquiry is whether, after severance, "the statute will function in a *manner* consistent with the intent of Congress." *Alaska Airlines v. Brock*, 480 U.S. 678, 685 (1987). The *Alaska Airlines* court noted that in severing a statute, courts should refrain from invalidating more of the statute than is necessary to ensure that the constitutional problem is avoided. *Id.* at 684. Applying these principles, the Eleventh Circuit in *Seminole Tribe* determined that although the court was required to sever the application of the judicial-enforcement provisions of IGRA to unconsenting states, the statutory provision authorizing the Secretary to issue procedures remained intact because the requirements for Indian tribes under those provisions were also necessarily severed. *Seminole Tribe*, 11 F.3d at 1029. This Court finds that affirming the Secretary's authority to issue these Gaming Procedures, in light of Texas's assertion of its Eleventh Amendment immunity, is the only means of severing IGRA while still allowing it to operate in a manner consistent with the intent of Congress. *Alaska Airlines*, 480 U.S. at 685. Congress's intent in enacting IGRA was to develop a regulatory framework that balanced the interest of the states and the tribes. *See* S. REP. N. 100-446, 100th Cong.2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 376; *Spokane Tribe,* 139 F.3d at 1298-1299. It would appear, therefore, that if the Gaming Procedures could not be applied to an unconsenting state, the outcome would be a state

veto over tribal gaming-a result directly at odds with Congress's intent in maintaining a balance of interests.

The United States argues[4] that applying part two of the *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*[5] inquiry, the Secretary reasonably interpreted IGRA to provide a specific grant of authority under the general-authority statutes (25 U.S.C. §§ 2, 9 (2001)) to promulgate the Gaming Procedures meant to fill the gap created by the Supreme Court's decision in *Seminole Tribe.* Texas asserts that no such authority exists to fill the gap created by *Seminole Tribe,* and argues that the promulgation of the Gaming Procedures constitutes an invalid delegation of legislative authority. [6] This Court disagrees.

Under the two-step inquiry established in *Chevron,* courts must first ask whether Congress has spoken directly to the precise issue. *Chevron,* 467 U.S. at 842-43. In this case, there is no dispute that Congress has not addressed this issue. The second

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[4] The Kickapoo Tribe incorporates the United States' arguments regarding the Secretary's authority to issue procedures arising from the general-authority statutes. *See* 25 U.S.C. §§ 2, 9 (2001).

[5] 467 U.S. 837, 842-43 (1984).

[6] In addition to challenging the Secretary's authority to issue procedures under IGRA, Texas also challenges the specific authority granted to the Secretary in those procedures. The Court declines to address this extended argument, however, as the issue before the Court at this time is limited solely to the scope of the Secretary's authority to promulgate procedures, not the application or substance of those procedures.

step then requires court to defer to the agency's interpretation if it is reasonable. *Id.* Deference is given where the agency's construction is permissible- the court can reverse "only if the agency's construction is arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843 (internal quotations omitted).

Section 9 of the general-authority statutes for the Bureau of Indian Affairs grants authority to the President of the United States to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs." 25 U.S.C. §9. Section 2 - subdelegates this authority to the Commissioner of Indian Affairs. *Id.* at §2. These provisions have been upheld by the courts as valid statutory grants of authority to the executive to manage Indian affairs and promulgate regulations. *See Morton v. Ruiz*, 415 U.S. 199 (1974); *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979); *Miami Nation of Indians of Indiana, Inc. v. United States Dept. of the Interior*, 255 F.3d 342 (7th Cir. 2001); *James v. United States Dept. of Health and Human Servs.*, 824 F.2d 1132 (D.C. Cir. 1987); *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741 (10th Cir. 1987); *United States v. Eberhardt*, 789 F.2d 1354 (9th Cir. 1986).

This Court finds that IGRA vests the Secretary with the authority to promulgate the procedures governing Class III gaming on tribal land in light of her authority and trust responsibility under IGRA. Although Congress did not expressly grant authority to the Secretary to promulgate rules in the wake of

the Supreme Court's *Seminole Tribe* decision, that grant of authority may be inferred from both the language in IGRA and the general-authority statutes. This inference is reasonable in light of IGRA's compacting and remedy provisions and the Secretary's general authority to implement regulations for acts related to Indian affairs. Therefore, this Court concludes that IGRA and the general-authority statutes provide the Secretary with the authority to promulgate the Gaming Procedures at issue in this case.

C. Standing, Good-Faith Negotiations, and Harm

Both the United States and the Kickapoo Tribe raise a subject-matter jurisdiction question, arguing that Texas does not have standing to bring suit at this time. The Kickapoo Tribe asserts that Texas has failed to meet the three legal requirements for demonstrating injury in fact because the alleged injury is not "concrete and particularized"; is not "actual and imminent"; and does not involve a "legally protected interest." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Because there has been no final ruling by the Department on the Kickapoo Tribe's gaming application, the Kickapoo Tribe contends, there is no harm. The mere existence of the Gaming Procedures alone do not create a controversy. The United States further contends that IGRA provides the states with the authority to participate in good faith with Indian tribes in the regulation of gaming, but that if a state decides not to participate or does not participate in good faith, the Indian tribe, through the Department's promulgation of procedures governing Class III gaming on tribal

lands, is granted access to a mediation process that, through a series of sequential mechanisms, may ultimately provide for tribal gaming without direct participation of the state.

Texas argues that its injury is the loss of its right under IGRA to negotiate in good faith and not be subject to any remedial procedures promulgated by the Department and not found in IGRA. Relying on *Alaska Dep't of Environmental Conservation v. EPA*, 540 U.S. 461, 483 (2004). Texas contends that the Gaming Procedures need not be applied to be subject to judicial review because the "final agency action" is the publishing of the regulations themselves. Texas's position, however, is in direct conflict with federal-court precedent. A pre-application review of a final agency rule is warranted only if the issues are fit for determination and a delay in making such a determination will cause hardship to the challenging party. *See Central & South West Servs., Inc. v. United States, EPA*, 220 F.3d 683, 690 (5th Cir. 2000) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967)). This "ripeness doctrine" was established by the Supreme Court to prevent courts "from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories*, 387 U.S. at 148-49. *See also American Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 296-297 (5th Cir. 1998)(citing *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 833 F.2d 583, 587 (5th Cir. 1987) ("*NOPSI*")). Even where an issue presents a purely legal question,

the plaintiff still must show some hardship in order to establish ripeness. *See American Forest*, 137 F.3d at 296; *Chevron*, 987 F.2d at 1153-54; *NOPSI*, 833 F.2d at 588. Although the issues raised by Texas in this case are primarily legal, this Court finds that they are not ripe for judicial review at this time because Texas's claims are contingent upon future events that may or may not occur (*i.e.*, the Secretary's approval of the Kickapoo Tribe's Class III gaming application). Additionally, Texas has offered no evidence that it will suffer hardship if the Court defers consideration of this issue until after the Department's Gaming Procedures have been fully applied and a final determination by the Secretary has been issued. Texas asserts that it has been harmed by the fact that it has been denied the right to be involved in the Secretary's review of the Kickapoo's application pursuant to Department's Gaming Procedures. This Court concludes, however, that Texas has been denied no such right. The Department has invited Texas to participate in informal conferences to discuss the Kickapoo Tribe's application, most recently on December 2, 2004,[7] but Texas steadfastly and repeatedly refused to participate.[8] Therefore, Texas must wait until the

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[7] *See* United States' Status Report filed December 14, 2004 (Doc. # 69).

[8] The Court notes that the record in this case indicates that Texas does permit some forms of Class III gaming. *See* Exhibit 11 to Joint Stipulations of Fact (Doc. # 47). Several courts have found a lack of good faith where a state categorically refuses to negotiate when the state has otherwise permitted Class III gaming as defined under IGRA. *See Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1032 (2d Cir.1990); *Ysleta Del Sur Pueblo v. Texas*, 852 F.Supp. 587, 596 (W.D.Tex.1993), *rev'd on other grounds*,36 F.3d 1325 (5th Cir.1994); *Flambeau Band*

Secretary has made a final determination of the Kickapoo Tribe's application to challenge the validity of the Department's Gaming Procedures. Therefore, based on this record, this Court concludes that any hardship Texas could suffer is conjectural and thus, the issue is not ripe for review at this time.

III. Conclusion

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment filed July 14, 2004 (Doc. # 46) is **DENIED.**

IT IS FURTHER ORDERED that United States Motion for Judgment on the Pleadings or in the Alternative Cross-Motion for Summary Judgment filed August 18, 2004 (Doc. # 48) and Defendant-Intervenor's Motion to Dismiss, or in the Alternative for Summary Judgment filed August 18, 2004 (Doc. # 50) are **GRANTED TO THE EXTENT** that they assert that Texas's cause of action is premature. In all other respects, the motions are **DENIED.**

Plaintiff the State of Texas's action is hereby **DISMISSED WITHOUT PREJUDICE** to refile same once the Secretary of the Interior has issued a final decision on the Kickapoo Traditional Tribe of Texas's Class III gaming application.

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of Lake Superior Chippewa Indians v. Wisconsin, 770 F.Supp. 480, 482 (W.D.Wis.1991).

SIGNED this 30th day of March, 2005.

s/LEE YEAKEL
United States District Judge

APPENDIX C: Denial of Rehearing Petition
(United States Court of Appeals for the Fifth Circuit)

U.S. Court of Appeals FILED Nov 28 2007
Charles R. Fulbruge III Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-50754

STATE OF TEXAS

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; DIRK KEMPTHORNE, in his Official Capacity as Secretary of the Department of the Interior

Defendants - Appellees

KICKAPOO TRADITIONAL TRIBE OF TEXAS

Intervenor – Defendant – Appellee

Appeal from the United States District Court for the Western District of Texas, Austin

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ON PETITIONS FOR REHEARING EN BANC

(Opinion 8/17/07, 5 Cir., _____, _____ F.3d ____)

Before JONES, KING AND DENNIS, Circuit Judges.

PER CURIAM:

(X) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

( ) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/Edith H. Jones
United States Circuit Judge

DENNIS, Circuit Judge, dissenting from the denial of rehearing en banc:
I respectfully dissent from the refusal to rehear this case en banc for the reasons assigned in my dissenting opinion.

APPENDIX D: 25 U.S.C. §§ 2701, 2702, and 2710(d)

25 U.S.C.

Sec. 2701 Findings

The Congress finds that -

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

Sec. 2702. Declaration of policy

The purpose of this chapter is -

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting

tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

Sec. 2710. Tribal gaming ordinances

(d) Class III gaming activities; authorization; revocation; Tribal-State compact.

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that-

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State

compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2) (A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that--

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D)of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D) (i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution

revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection--

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3) (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of

gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political

subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that--

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7) (A) The United States district courts shall have jurisdiction over--

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B) (i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that--

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian

lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this Act, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8) (A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates--

(i) any provision of this Act,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this Act.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

APPENDIX E: 25 C.F.R. Part 291

Code of Federal Regulations

Title 25: Indians

PART 291—CLASS III GAMING PROCEDURES

Section Contents

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§291.14 How can Class III gaming procedures approved by the Secretary be amended?
§291.15 How long do Class III gaming procedures remain in effect?

Authority: 5 U.S.C. 301; 25 U.S.C. sections 2,9 and 2710.

Source: 64 FR 17543, Apr. 12, 1999, unless otherwise noted.

§ 291.1 Purpose and scope.

The regulations in this part establish procedures that the Secretary will use to promulgate rules for the conduct of Class III Indian gaming when:

(a) A State and an Indian tribe are unable to voluntarily agree to a compact and;

(b) The State has asserted its immunity from suit brought by an Indian tribe under 25 U.S.C. 2710(d)(7)(B).

§ 291.2 Definitions

(a) All terms have the same meaning as set forth in the definitional section of IGRA, 25 U.S.C. section 2703(1)–(10).

(b) The term "compact" includes renewal of an existing compact.

§ 291.3 When may an Indian tribe ask the Secretary to issue Class III gaming procedures?

An Indian tribe may ask the Secretary to issue Class III gaming procedures when the following steps have taken place:

(a) The Indian tribe submitted a written request to the State to enter into negotiations to establish a Tribal-State compact governing the conduct of Class III gaming activities;

(b) The State and the Indian tribe failed to negotiate a compact 180 days after the State received the Indian tribe's request;

(c) The Indian tribe initiated a cause of action in Federal district court against the State alleging that the State did not respond, or did not respond in good faith, to the request of the Indian tribe to negotiate such a compact;

(d) The State raised an Eleventh Amendment defense to the tribal action; and

(e) The Federal district court dismissed the action due to the State's sovereign immunity under the Eleventh Amendment.

§ 291.4 What must a proposal requesting Class III gaming procedures contain?

A proposal requesting Class III gaming procedures must include the following information:

(a) The full name, address, and telephone number of the Indian tribe submitting the proposal;

(b) A copy of the authorizing resolution from the Indian tribe submitting the proposal;

(c) A copy of the Indian tribe's gaming ordinance or resolution approved by the NIGC in accordance with 25 U.S.C. 2710, if any;

(d) A copy of the Indian tribe's organic documents, if any;

(e) A copy of the Indian tribe's written request to the State to enter into compact negotiations, along with the Indian tribe's proposed compact, if any;

(f) A copy of the State's response to the tribal request and/or proposed compact, if any;

(g) A copy of the tribe's Complaint (with attached exhibits, if any); the State's Motion to Dismiss; any Response by the tribe to the State's Motion to Dismiss; any Opinion or other written documents from the court regarding the State's Motion to Dismiss; and the Court's Order of dismissal;

(h) The Indian tribe's factual and legal authority for the scope of gaming specified in paragraph (j)(13) of this section;

(i) Regulatory scheme for the State's oversight role, if any, in monitoring and enforcing compliance; and

(j) Proposed procedures under which the Indian tribe will conduct Class III gaming activities, including:

(1) A certification that the tribe's accounting procedures are maintained in accordance with American Institute of Certified Public Accountants Standards for Audits of Casinos, including

maintenance of books and records in accordance with Generally Accepted Accounting Principles and applicable NIGC regulations;

(2) A reporting system for the payment of taxes and fees in a timely manner and in compliance with Internal Revenue Code and Bank Secrecy Act requirements;

(3) Preparation of financial statements covering all financial activities of the Indian tribe's gaming operations;

(4) Internal control standards designed to ensure fiscal integrity of gaming operations as set forth in 25 CFR Part 542;

(5) Provisions for records retention, maintenance, and accessibility;

(6) Conduct of games, including patron requirements, posting of game rules, and hours of operation;

(7) Procedures to protect the integrity of the rules for playing games;

(8) Rules governing employees of the gaming operation, including code of conduct, age requirements, conflict of interest provisions, licensing requirements, and such background investigations of all management officials and key employees as are required by IGRA, NIGC regulations, and applicable tribal gaming laws;

(9) Policies and procedures that protect the health and safety of patrons and employees and that address insurance and liability issues, as well as safety

systems for fire and emergency services at all gaming locations;

(10) Surveillance procedures and security personnel and systems capable of monitoring movement of cash and chips, entrances and exits of gaming facilities, and other critical areas of any gaming facility;

(11) An administrative and/or tribal judicial process to resolve disputes between gaming establishment, employees and patrons, including a process to protect the rights of individuals injured on gaming premises by reason of negligence in the operation of the facility;

(12) Hearing procedures for licensing purposes;

(13) A list of gaming activities proposed to be offered by the Indian tribe at its gaming facilities;

(14) A description of the location of proposed gaming facilities;

(15) A copy of the Indian tribe's liquor ordinance approved by the Secretary if intoxicants, as used in 18 U.S.C. 1154, will be served in the gaming facility;

(16) Provisions for a tribal regulatory gaming entity, independent of gaming management;

(17) Provisions for tribal enforcement and investigatory mechanisms, including the imposition of sanctions, monetary penalties, closure, and an administrative appeal process relating to enforcement and investigatory actions;

(18) The length of time the procedures will remain in effect; and

(19) Any other provisions deemed necessary by the Indian tribe.

§ 291.5 Where must the proposal requesting Class III gaming procedures be filed?

Any proposal requesting Class III gaming procedures must be filed with the Director, Indian Gaming Management Staff, Bureau of Indian Affairs, U.S. Department of the Interior, MS 2070-MIB, 1849 C Street NW, Washington, DC 20240.

§ 291.6 What must the Secretary do upon receiving a proposal?

Upon receipt of a proposal requesting Class III gaming procedures, the Secretary must:

(a) Within 15 days, notify the Indian tribe in writing that the proposal has been received, and whether any information required under §291.4 is missing;

(b) Within 30 days of receiving a complete proposal, notify the Indian tribe in writing whether the Indian tribe meets the eligibility requirements in §291.3. The Secretary's eligibility determination is final for the Department.

§ 291.7 What must the Secretary do if it has been determined that the Indian tribe is eligible to request Class III gaming procedures?

(a) If the Secretary determines that the Indian tribe is eligible to request Class III gaming procedures and that the Indian tribe's proposal is complete, the Secretary must submit the Indian tribe's proposal to

the Governor and the Attorney General of the State where the gaming is proposed.

(b) The Governor and Attorney General will have 60 days to comment on:

(1) Whether the State is in agreement with the Indian tribe's proposal;

(2) Whether the proposal is consistent with relevant provisions of the laws of the State;

(3) Whether contemplated gaming activities are permitted in the State for any purposes, by any person, organization, or entity.

(c) The Secretary will also invite the State's Governor and Attorney General to submit an alternative proposal to the Indian tribe's proposed Class III gaming procedures.

§ 291.8 What must the Secretary do at the expiration of the 60-day comment period if the State has not submitted an alternative proposal?

(a) Upon expiration of the 60-day comment period specified in §291.7, if the State has not submitted an alternative proposal, the Secretary must review the Indian tribe's proposal to determine:

(1) Whether all requirements of §291.4 are adequately addressed;

(2) Whether Class III gaming activities will be conducted on Indian lands over which the Indian tribe has jurisdiction;

(3) Whether contemplated gaming activities are permitted in the State for any purposes by any person, organization, or entity;

(4) Whether the proposal is consistent with relevant provisions of the laws of the State;

(5) Whether the proposal is consistent with the trust obligations of the United States to the Indian tribe;

(6) Whether the proposal is consistent with all applicable provisions of IGRA; and

(7) Whether the proposal is consistent with provisions of other applicable Federal laws.

(b) Within 60 days of the expiration of the 60-day comment period in §291.7, the Secretary must notify the Indian tribe, the Governor, and the Attorney General of the State in writing that he/she has:

(1) Approved the proposal if the Secretary determines that there are no objections to the Indian tribe's proposal; or

(2) Identified unresolved issues and areas of disagreements in the proposal, and invite the Indian tribe, the Governor and the Attorney General to participate in an informal conference, within 30 days of notification unless the parties agree otherwise, to resolve identified unresolved issues and areas of disagreement.

(c) Within 30 days of the informal conference, the Secretary must prepare and mail to the Indian tribe, the Governor and the Attorney General:

(1) A written report that summarizes the results of the informal conference; and

(2) A final decision either setting forth the Secretary's proposed Class III gaming procedures for the Indian tribe, or disapproving the proposal for any of the reasons in paragraph (a) of this section.

§ 291.9 What must the Secretary do at the end of the 60-day comment period if the State offers an alternative proposal for Class III gaming procedures?

Within 30 days of receiving the State's alternative proposal, the Secretary must appoint a mediator who:

(a) Has no official, financial, or personal conflict of interest with respect to the issues in controversy; and

(b) Must convene a process to resolve differences between the two proposals.

§ 291.10 What is the role of the mediator appointed by the Secretary?

(a) The mediator must ask the Indian tribe and the State to submit their last best proposal for Class III gaming procedures.

(b) After giving the Indian tribe and the State an opportunity to be heard and present information supporting their respective positions, the mediator must select from the two proposals the one that best comports with the terms of IGRA and any other applicable Federal law. The mediator must submit the proposal selected to the Indian tribe, the State, and the Secretary.

§ 291.11 What must the Secretary do upon receiving the proposal selected by the mediator?

Within 60 days of receiving the proposal selected by the mediator, the Secretary must do one of the following:

(a) Notify the Indian tribe, the Governor and the Attorney General in writing of his/her decision to approve the proposal for Class III gaming procedures selected by the mediator; or

(b) Notify the Indian tribe, the Governor and the Attorney General in writing of his/her decision to disapprove the proposal selected by the mediator for any of the following reasons:

(1) The requirements of §291.4 are not adequately addressed;

(2) Gaming activities would not be conducted on Indian lands over which the Indian tribe has jurisdiction;

(3) Contemplated gaming activities are not permitted in the State for any purpose by any person, organization, or entity;

(4) The proposal is not consistent with relevant provisions of the laws of the State;

(5) The proposal is not consistent with the trust obligations of the United States to the Indian tribe;

(6) The proposal is not consistent with applicable provisions of IGRA; or

(7) The proposal is not consistent with provisions of other applicable Federal laws.

(c) If the Secretary rejects the mediator's proposal under paragraph (b) of this section, he/she must prescribe appropriate procedures within 60 days under which Class III gaming may take place that comport with the mediator's selected proposal as much as possible, the provisions of IGRA, and the relevant provisions of the laws of the State.

§ 291.12 Who will monitor and enforce tribal compliance with the Class III gaming procedures?

The Indian tribe and the State may have an agreement regarding monitoring and enforcement of tribal compliance with the Indian tribe's Class III gaming procedures. In addition, under existing law, the NIGC will monitor and enforce tribal compliance with the Indian tribe's Class III gaming procedures.

§ 291.13 When do Class III gaming procedures for an Indian tribe become effective?

Upon approval of Class III gaming procedures for the Indian tribe under either §291.8(b), §291.8(c), or §291.11(a), the Indian tribe shall have 90 days in which to approve and execute the Secretarial procedures and forward its approval and execution to the Secretary, who shall publish notice of their approval in the Federal Register. The procedures take effect upon their publication in the Federal Register.

§ 291.14 How can Class III gaming procedures approved by the Secretary be amended?

An Indian tribe may ask the Secretary to amend approved Class III gaming procedures by submitting an amendment proposal to the Secretary. The Secretary must review the proposal by following the approval process for initial tribal proposals, except that the requirements of §291.3 are not applicable and he/she may waive the requirements of §291.4 to the extent they do not apply to the amendment request.

§ 291.15 How long do Class III gaming procedures remain in effect?

Class III gaming procedures remain in effect for the duration specified in the procedures or until amended pursuant to §291.14.

APPENDIX F: 25 U.S.C. §§ 2 and 9

25 U.S.C.

Section 2. Duties of Commissioner

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

Section 9. Regulations by the President

The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

No. 07-1109

In the Supreme Court of the United States

KICKAPOO TRADITIONAL TRIBE OF TEXAS,
PETITIONER

v.

STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
RONALD J. TENPAS
Assistant Attorney General
JAMES C. KILBOURNE
LANE M. MCFADDEN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in invalidating agency regulations providing that the Secretary of the Interior may establish procedures for Indian gaming in the event that a State does not agree to enter into a tribal-state compact and invokes its Eleventh Amendment immunity from a suit brought under the Indian Gaming Regulatory Act, 25 U.S.C. 2710(d)(7)(A)(i).

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In the Supreme Court of the United States

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KICKAPOO TRADITIONAL TRIBE OF TEXAS,
PETITIONER

v.

STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-74a) is reported at 497 F.3d 491. The opinion of the district court (Pet. App. 75a-90a) is reported at 362 F. Supp. 2d 765.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2007. Petitions for rehearing were denied on December 6, 2007 (Pet. App. 91a-92a). The petition for a writ of certiorari was filed on February 25, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1987, this Court held that neither the Act of August 15, 1953, ch. 505, 67 Stat. 588 (18 U.S.C. 1662 and 28 U.S.C. 1360), nor the Organized Crime Control Act of 1970 (18 U.S.C. 1955), authorized California to enforce its regulatory gaming laws against Indian Tribes operating bingo and poker games on their reservations. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). That decision left much Indian gaming unregulated by the States. The following year, Congress enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.* Finding that existing federal law did not "provide clear standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. 2701(3), Congress enacted IGRA both "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," and to "provide a statutory basis for the regulation of gaming by an Indian tribe," 25 U.S.C. 2702(1) and (2).

IGRA divides gaming activities into three classes, each subject to different rules and prohibitions. Class I gaming, over which Indian Tribes exercise exclusive regulatory control, consists of social games for prizes of minimal value and traditional games engaged in as part of tribal ceremonies. 25 U.S.C. 2703(6), 2710(a)(1). Class II gaming consists of bingo, other games similar to bingo, and non-banking card games. 25 U.S.C. 2703(7). Indian Tribes maintain regulatory jurisdiction over Class II gaming, 25 U.S.C. 2710(a)(2), subject to the supervision of the National Indian Gaming Commission, 25 U.S.C. 2710(b) and (c); see 25 U.S.C. 2704.

Class III gaming, the type of gaming at issue in this case, is gaming that does not fall within Class I or Class II, and includes banking card games, casino games, slot machines, sports betting and parimutuel wagering, and lotteries. 25 U.S.C. 2703(8); 25 C.F.R. 502.4. Class III gaming is lawful only if, *inter alia*, it is "conducted in conformance with a Tribal-State compact." 25 U.S.C. 2710(d)(1)(C). A tribal-state compact may address such matters as standards for the conduct of the gaming, the application of state or tribal criminal and civil laws, assessments to defray the costs of state regulation, taxation by the Tribe, and remedies for breach of contract. 25 U.S.C. 2710(d)(3)(C). The Secretary of the Interior (Secretary) is authorized to approve any tribal-state compact and may disapprove such a compact only if it violates IGRA, any other provision of federal law, or the trust obligations of the United States to Indians. 25 U.S.C. 2710(d)(8).

To facilitate the formation of tribal-state compacts for Class III gaming, IGRA provides that, when a Tribe so requests, "the State shall negotiate with the Indian Tribe in good faith to enter into such a compact." 25 U.S.C. 2710(d)(3)(A). Should negotiations fail, IGRA provides that the Tribe may file suit against the State alleging that the State has refused to negotiate or has failed to negotiate in good faith. 25 U.S.C. 2710(d)(7)(B)(ii). If a court finds that the State did not negotiate in good faith, it may order the parties to conclude a compact, 25 U.S.C. 2710(d)(7)(B)(iii), and may order a mediator to administer the process and select from proposed compacts, 25 U.S.C. 2710(d)(7)(B)(iv). Ultimately, should the State refuse to consent to the compact chosen by the mediator, the mediator must notify the Secretary, who "shall prescribe * * * proce-

dures * * * under which Class III gaming may be conducted," consistent with the proposed compact selected by the mediator, IGRA, and the laws of the State. 25 U.S.C. 2710(d)(7)(B)(vii).

b. In 1996, this Court held that IGRA does not validly abrogate state sovereign immunity conferred by the Eleventh Amendment, and that federal courts therefore do not have jurisdiction over suits brought by an Indian Tribe against a State under IGRA unless the State consents to suit. *Seminole Tribe* v. *Florida*, 517 U.S. 44, 72-73 (1996). In response to *Seminole Tribe*, the Secretary promulgated regulations establishing a process for the creation of gaming procedures in the event that a State does not voluntarily enter a tribal-state compact and invokes its Eleventh Amendment immunity from suit. *Class III Gaming Procedures*, 64 Fed. Reg. 17,535 (1999) (codified at 25 C.F.R. Pt. 291) (Procedures Regulations). The regulations provide that, if a Tribe and a State are unable to agree on a compact, and the State invokes its Eleventh Amendment immunity from suit, the Secretary may, after consultation with the State and the Tribe, promulgate procedures setting out the terms under which gaming may occur. 25 C.F.R. 291.1. See generally 25 C.F.R. Pt. 291.

2. Petitioner first requested negotiations for a Class III gaming compact with the State of Texas in 1995. Texas rejected petitioner's request to negotiate a compact, and petitioner sued Texas in federal district court pursuant to IGRA. See Pet. App. 78a (describing prior suit). The district court dismissed petitioner's suit in 1996, after this Court issued its decision in *Seminole Tribe*. *Ibid.*

In December 2003, petitioner submitted to the Department of the Interior an application for Class III

gaming procedures under the Procedures Regulations, and the Secretary invited comments and an alternative gaming proposal from the State, as the regulations require. See 25 C.F.R. 291.7. Texas did not respond to the request, but instead filed a lawsuit challenging the Secretary's authority to promulgate the Procedures Regulations. Petitioner intervened as a party defendant. Pet. App. 6a; Pet. 8. The district court granted summary judgment in favor of the defendants, holding that because no gaming procedures had been issued by the Secretary, the State's suit was not yet ripe. Pet. App. 75a-90a.

3. A divided panel of the court of appeals reversed. Pet. App. 1a-74a. The court first concluded that the case was justiciable, even though the Secretary had not yet issued gaming procedures at the time Texas filed suit. *Id.* at 7a-16a. As to the merits, Chief Judge Jones (*id.* at 1a-41a) and Judge King (*id.* at 42a-44a) both concluded, in separate opinions, that the Procedures Regulations are invalid.

Chief Judge Jones took the position that the Procedures Regulations fail at the first step of the analysis set forth in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), because IGRA "permits limited secretarial intervention only as a last resort, and only after the statute's judicial remedial procedures have been exhausted," and because "Congress did not explicitly authorize the Secretarial Procedures." Pet. App. 19a-20a. Chief Judge Jones further rejected the argument that the Secretary had implicit authority to fill in the statutory gap created by this Court's *Seminole Tribe* decision, concluding that "any delegation-engendering gap contained in a statute, whether implicit or explicit, must have been 'left open *by Congress*,' not created after the fact by a court." *Id.* at

24a (quoting *Chevron*, 467 U.S. at 866). In the alternative, Chief Judge Jones concluded that the Procedures Regulations fail at *Chevron* step two, because IGRA allows the Secretary to prescribe gaming procedures only after "exhaustion of the judicial good-faith/mediation process." *Id.* at 33a. In Chief Judge Jones's view, the Procedures Regulations are not based on a reasonable interpretation of IGRA because, unlike the statute, the regulations do not require a determination whether the State has negotiated in good faith; permit the Secretary, rather than a court, to appoint a mediator; and contain no requirement that the Secretary's procedures be consistent with the proposals of the mediator, the Tribe, or the State. *Id.* at 36a-37a. Finally, Chief Judge Jones rejected the argument that 25 U.S.C. 2 and 9, which confer authority to issue regulations to implement statutes relating to Indian affairs, confer on the Secretary the authority to prescribe the Procedures Regulations. Pet. App. 37a-40a.

Judge King concurred with Chief Judge Jones's opinion respecting the justiciability of the suit, but filed a separate opinion concurring in the judgment as to the merits. Pet. App. 42a-44a. In her view, although the Secretary had the statutory authority to fill the gap in IGRA left by this Court's *Seminole Tribe* decision, the Procedures Regulations exceed that authority because they omit "Congress's chosen prerequisites of a court determination of a state's bad faith and court-directed mediation." *Id.* at 42a-43a.

Judge Dennis dissented. Pet. App. 44a-74a. In his view, *Seminole Tribe* did not create a gap in IGRA; rather, "Congress itself created the gap or ambiguity by mistakenly overestimating its powers and passing a statute that could not be constitutionally applied as Con-

gress intended," and the Court in *Seminole Tribe* "merely declared its existence." *Id.* at 51a. Judge Dennis concluded that the Secretary had authority to fill in that gap both under IGRA and under 25 U.S.C. 2 and 9. Pet. App. 47a. Finally, Judge Dennis concluded that the Procedures Regulations are a reasonable gap-filling measure. He explained that, in enacting IGRA,

> Congress intended to allow Indian gaming to proceed, for the purpose of economically benefitting Indian tribes, after a negotiating process that would give states a right to negotiate towards the ultimate outcome. In the case of a state that attempted to halt or veto this process without good faith, Congress intended that tribes would ultimately be able to force gaming even over the objections of the state. The Secretary's regulations at issue here may not be perfect, but by allowing tribes an alternate process to propose gaming procedures in cases where a state refuses to negotiate and refuses to be sued in federal court, they closely approximate what Congress likely would have intended, while the status quo after *Seminole* undisputedly subverts the national legislative aims in respect to Indian affairs and relations.

Id. at 67a-68a.

ARGUMENT

The court of appeals erred in invalidating the Procedures Regulations adopted by the Secretary of the Interior. No other court of appeals has yet addressed the validity of the Procedures Regulations, however, and the decision below does not conflict with any decision of this Court. Further review of the decision of the court of appeals is thus unwarranted.

1. a. The court of appeals erroneously held that the Procedures Regulations are invalid. As an initial matter, the court erred in reaching the merits, even though, at the time Texas filed suit, the Secretary had done nothing more than invite Texas officials to comment on petitioner's application. Texas suffered no hardship as a result; the mere invitation to comment has not required Texas to alter its conduct in any way. Texas's pre-implementation challenge to the Procedures regulations thus was not ripe, and the court of appeals' intervention was premature. See, *e.g.*, *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 808 (2003).

The court of appeals also erred in its holding on the merits. As Judge Dennis explained in his dissenting opinion (Pet. App. 65a-66a), the elaborate remedial procedure established in IGRA was "not intend[ed] to allow, as the *Seminole*-blunted statute does, a situation in which states could refuse to negotiate and thus veto a tribal-state compact." *Id.* at 65a. Rather, the remedial procedure was designed to result in the creation of a compact—and, failing that, in gaming procedures established by the Secretary, consistent with the compact proposed during mediation. *Id.* at 66a (citing 25 U.S.C. 2710(7)(B)(vii)). IGRA expressly contemplates that the end result of its elaborate remedial process will be gaming procedures, even in a circumstance where the State never agrees to a compact. 25 U.S.C. 2710(d)(7)(B)(vii). The Procedures Regulations are consistent with those provisions of IGRA, and reasonably effectuate the statute's purposes.

b. This Court's review is not, however, warranted. Although petitioner focuses largely on Chief Judge Jones's discussion of "the ability of an Executive Branch

official to fill an unintended and unforeseen gap in a statute he was delegated authority to administer," Pet. 16, that portion of Chief Judge Jones's opinion did not command a majority of the court. Ultimately, the judgment below rested on two judges' separate views that the Procedures Regulations are inconsistent in certain respects with the remedial process envisioned by Congress. Pet. App. 36a-37a, 42a-43a. That decision does not preclude the Secretary from taking future action to ensure that IGRA operates in a manner consistent with its purposes.

2. Petitioner contends (Pet. 11-14) that the decision below conflicts with decisions of the Ninth and Eleventh Circuits. That contention is incorrect. No other court of appeals has yet addressed the validity of the Procedures Regulations. Petitioner is correct that, in *United States* v. *Spokane Tribe of Indians*, 139 F.3d 1297 (9th Cir. 1998), and *Seminole Tribe* v. *Florida*, 11 F.3d 1016 (11th Cir. 1994), aff'd, 517 U.S. 44 (1996), the Ninth and Eleventh Circuits suggested that the Department of the Interior might "promulgate regulations that take the place of the compact process" when a State does not voluntarily enter into a compact and invokes its Eleventh Amendment immunity from a suit brought under IGRA. *Spokane Tribe of Indians*, 139 F.3d at 1302; see *Seminole Tribe*, 11 F.3d at 1029. But those decisions, both of which predated the promulgation of the Procedures Regulations, did not address the validity of the particular process that the Secretary chose to fill the statutory gap revealed in *Seminole Tribe*. There is thus no conflict between the decision below and the decision of any other court of appeals that warrants this Court's intervention.

3. Finally, petitioner contends (Pet. 20-26) that the decision below conflicts with *Alaska Airlines* v. *Brock*, 480 U.S. 678 (1987), in which this Court reaffirmed the traditional principle that an unconstitutional statutory provision must be severed from the remainder of the statute unless the result would be "legislation that Congress would not have enacted." *Id.* at 685. In petitioner's view, the severability principles described in *Alaska Airlines* mean that, "if the Secretary cannot fill the gap in IGRA's remedial framework for tribes that face unconsenting states, then the entirety of IGRA's requirements regarding state participation must be declared void as applied when the state refuses to participate in the IGRA remedial process." Pet. 25. As petitioner acknowledges (Pet. ii, 25-26), however, the court of appeals did not pass on the issue below; the question before the court was whether the Procedures Regulations are valid, not the consequences of their invalidation. The issue accordingly does not warrant this Court's review. See, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

RONALD J. TENPAS
Assistant Attorney General

JAMES C. KILBOURNE
LANE M. MCFADDEN
Attorneys

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No. 07-1109

In the Supreme Court of the United States

KICKAPOO TRADITIONAL TRIBE OF TEXAS,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

SEAN D. JORDAN
Acting Solicitor General

RYAN D. CLINTON
Assistant Solicitor General
Counsel of Record

WILLIAM L. DAVIS
Assistant Solicitor General

NANCY JUREN
Assistant Attorney General

P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

1. Did the court of appeals err by concluding that gaming regulations promulgated by the Secretary of the Interior in 1999 were inconsistent with the Indian Gaming Regulatory Act—an issue that no other federal court of appeals has addressed?

2. Assuming that the court of appeals correctly invalidated the Secretary's regulations, did the court err by declining to reach the Tribe's alternative issue regarding severability?

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STATEMENT

This suit began when the State of Texas sued the United States and other federal defendants (the "United States," collectively) over the validity of federal gaming regulations effected by the Secretary of the Interior in 1999. R.1-12. The United States prevailed in district court, Pet. App. 75a-90a, but lost in the court of appeals, *id.*, at 1a-74a. Even though the United States elected not to appeal the court of appeals's invalidation of the challenged regulations, the Kickapoo Traditional Tribe of Texas—an intervenor in the proceedings below—requests that the Court review the court of appeals's judgment and either (1) revive the regulations, or (2) strike portions of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§2701, *et seq.* See Pet. 20, 26. The State of Texas opposes the petition and the Tribe's requested relief.

I. BACKGROUND

In 1987, the Court held that, absent express permission from Congress, States generally could not regulate gaming activity on Indian reservations. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987). In response, Congress enacted IGRA to "provide a statutory basis for the regulation of gaming by an Indian tribe." 25 U.S.C. §2702(2). IGRA contemplates negotiations between States and tribes over casino gaming and permits casino gaming by tribes only under a tribal-state compact resulting from either (1) a State's agreement to a gaming compact, or (2) a judicial finding that a State negotiated in bad faith. *Id.*, §2710(d)(3)(B), (d)(7)(B)(iii).

Under this statutory scheme, representatives of the Governor of Texas met with representatives of the Tribe in 1995 to discuss the possibility of casino gaming on

tribal land in Texas. R.14. After meeting with the Tribe and reviewing applicable federal and state law, however, the Governor concluded that he could not consent to a tribal-state compact that included casino gaming because Texas law prohibits the operation of casinos. R.14.

After receiving the Governor's decision, the Tribe filed suit against the State of Texas, R.226-61, seeking to force the State to permit casino gaming, R.258-59. But before that suit concluded, this Court held that States may assert Eleventh Amendment immunity to defeat tribal gaming lawsuits filed under IGRA. *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 72-76 (1996). Pursuant to *Seminole Tribe*, the district court dismissed the Tribe's suit against Texas. R.604.

Three years later, the Secretary of the Interior effected final regulations governing gaming on tribal lands. Class III Gaming Procedures, 64 Fed. Reg. 17535 (1999) (codified at 25 C.F.R. Pt. 291). These regulations permit tribes to operate casinos without the consent of the State or a judicial finding of bad-faith negotiation. 25 C.F.R. §§291.1-291.15.[1]

In December 2003, the Tribe invoked the Secretary's 1999 regulations by submitting a gaming application to the Department of the Interior. R.189. The Secretary then notified the State that the Tribe's application was complete and met the regulations' eligibility requirements, and asked the State for comment. R.68.

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1. The Tribe's description of the 1999 regulations as "Congress's fallback remedy," Pet. 2; *id.*, at 9, 14, is inaccurate. The Secretary—not Congress—promulgated the challenged regulations.

II. TEXAS'S SUIT CONTESTING THE VALIDITY OF THE SECRETARY'S GAMING REGULATIONS

In March 2004, the State of Texas filed suit against the United States, seeking to invalidate the Secretary's 1999 gaming regulations. R.1-12. The Tribe intervened, R.138-151, 200, and both the United States and the Tribe moved for summary judgment, asserting that the State lacked standing, that its suit was not ripe, and that the regulations were valid, R.669-723, 821-22. The Tribe alternatively requested that the Court strike portions of IGRA based on a severability theory. See Pet. 25 n.64. The district court concluded that the State's suit was not ripe and that the challenged regulations were valid. Pet. App. 85a-89a. The court did not grant the Tribe's request to strike the remainder of IGRA. *Id.*, at 89a.

Texas appealed to the Fifth Circuit, arguing that its suit was ripe and that the 1999 regulations are invalid. See Texas CA5 Appellant's Br. 11-29. The Tribe did not file a cross-appeal based on its severability argument.

The court of appeals reversed. In separate opinions, Chief Judge Jones and Judge King concluded that the State had standing and that its claims were ripe for review, Pet. App. 7a-16a, 42a, and that the Secretary's regulations were invalid, *id.*, at 16a-44a. Judge King also suggested that the severability issue was "not before th[e] court." *Id.*, at 44a. Judge Dennis dissented. *Id.*, at 44a-74a.[2]

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2. The Tribe's assertion that the court of appeals severed "part of the statute," see Pet. 4, is incorrect. The court did not strike any part of IGRA. Pet. App. 1a-44a.

The United States did not seek a writ of certiorari, but the Tribe did. See Pet. iii. The Tribe's petition asserts that the court of appeals erred by holding that the Secretary's 1999 gaming regulations were inconsistent with IGRA, and, alternatively, by failing to strike portions of IGRA. Pet. i-ii.

The United States opposes the Tribe's petition, in part because "[t]here is . . . no conflict between the decision below and the decision of any other court of appeals that warrants this Court's intervention." Fed. Br. in Opp. 9. In addition, the United States believes that the court of appeals's "decision does not preclude the Secretary from taking future action to ensure that IGRA operates in a manner consistent with its purposes." *Ibid.*

REASONS TO DENY THE PETITION

For many reasons, the Tribe's petition is an unattractive—indeed, inappropriate—vehicle to consider the issues presented. Foremost, the Tribe lacks standing to defend federal regulations that the United States elected *not* to further defend on appeal, and any injury it can claim from the court of appeals's decision is not redressable by a favorable judgment from the Court in this case. In addition, the issues presented do not warrant the Court's review because there is no split in the federal circuits for the Court to resolve; rather, the court of appeals was the first—and only—federal court of appeals to have passed upon the validity of the Secretary's 1999 gaming regulations. Likewise, the petition is fatally flawed if the Tribe and United States are correct that the State of Texas had no standing to challenge the regulations or that the State's suit was not ripe.

Regardless, the Court should deny the petition because the court of appeals did not err in invalidating the Secretary's regulations. The regulations conflict with Congress's intent as expressed in IGRA, and they violate both the separation-of-powers doctrine and the non-delegation doctrine.

I. THE TRIBE LACKS STANDING TO APPEAL.

Article III of the United States Constitution limits the Court's authority to deciding only "'cases' and 'controversies.'" *Diamond* v. *Charles*, 476 U.S. 54, 61-62 (1986) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). "To qualify as a party with standing to litigate, a person must show, first and foremost, 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Article III standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Id.* (citing *Diamond*, 476 U.S., at 62).

The Tribe cannot meet Article III's standing requirement for two reasons. First, the Tribe has no authority to assert the sovereign interest of defending governmental regulations. See Part I.A, *infra*. And second, the Tribe has no actual or threatened injury that is redressable by a reversal of the court of appeals's judgment invalidating the Secretary's 1999 regulations. See Part I.B, *infra*.

A. The Tribe Cannot Usurp the United States's Sovereign Authority To Determine Whether To Continue Defending Invalidated Federal Regulations.

By electing *not* to appeal the court of appeals's judgment, the United States indicated its "acceptance of that decision, and its lack of interest in defending its own [regulations]." *Diamond*, 476 U.S., at 63. As a result, no case or controversy exists between Texas and the United States that could support the Court's jurisdiction. *Ibid.* (citing *Princeton Univ.* v. *Schmid*, 455 U.S. 100, 102 (1982) (per curiam)).

Although the Tribe has filed a petition for a writ of certiorari, its non-governmental interest in the lawsuit is insufficient to meet the Constitution's standing requirement. Indeed, the Court has already held that a private intervenor lacks the authority to compel the continued defense of a law that a sovereign entity elects not to continue defending. *Diamond*, 476 U.S., at 65.

In *Diamond*, a private intervenor sought to appeal a lower court's invalidation of an Illinois statute. *Id.*, at 64. Because the State of Illinois elected to discontinue defending its statute, the Court held that the private intervenor had no standing to appeal the lower court's decision. The Court wrote:

> "[C]oncerns for the state autonomy that deny private individuals the right to compel a State to enforce its laws apply with even greater force to an attempt by a private individual to compel a State to create and retain [a] legal framework . . . . The State's acquiescence in the Court of Appeals'

> determination of unconstitutionality serves to deprive the State of the power to [enforce the law at issue]. [The intervenor's] attempt to maintain the litigation is, then, simply an effort to compel the State to enact a code in accord with [the intervenor's] interests. But 'the power to create and enforce a legal code, both civil and criminal[,]' is one of the quintessential functions of a State. Because the State alone is entitled to create a legal code, only the State has the kind of 'direct stake' . . . [necessary to defend] the standards embodied in that code."

Id., at 65 (internal citations omitted).

Pursuant to *Diamond*, the Tribe does not have standing to appeal the court of appeals's invalidation of the Secretary's 1999 gaming regulations. By not filing a petition for a writ of certiorari—and, indeed, by opposing the Tribe's petition—the United States elected not to defend the regulations, thereby "acquiesc[ing] in the Court of Appeals' determination" of the regulations' invalidity. Cf. *ibid.* Its decision to do so is a "quintessential function" of the government—one that cannot be usurped by private interests. *Ibid.* Because the Tribe does not share the federal government's "direct stake" necessary to defend the Secretary's regulations, it has no standing to appeal the court of appeals's judgment. *Ibid.*[3]

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3. The Court should also deny the Tribe standing to appeal for prudential reasons: the Tribe cannot assert the federal government's direct interest in defending its regulations. Cf. *Warth* v. *Seldin*, 422 U.S. 490, 499-500 (1975).

B. The Tribe Has No Redressable Injury.

Article III standing requires litigants to have a concrete and particularized, redressable injury. *Arizonans for Official English*, 520 U.S., at 64, 70. This requirement remains necessary on appeal—and is particularly important when an intervenor wishes to appeal a judgment that the named defendant elected not to appeal. *Ibid.* Here, the Tribe's alleged injury is its inability to operate casinos in Texas. But because casinos are unlawful in Texas—and the Secretary's 1999 gaming regulations do not permit gaming that is otherwise unlawful in a State—the Tribe has no redressable injury on appeal.

Under both IGRA and the Secretary's 1999 regulations, tribes are permitted to conduct only those gaming activities that are otherwise lawful in a State. For example, IGRA makes clear that the Secretary cannot prescribe gaming procedures that are inconsistent with "provisions of the laws of the State" at issue. 25 U.S.C. §2710(d)(7)(B)(vii)(I); see also *id.*, §2701(5) (contemplating gaming only within "a State which does not, as a matter of criminal law or public policy, prohibit such gaming activity"). Likewise, the invalidated regulations permit gaming by tribal-state compact only when the "contemplated gaming activities are permitted in the State." 25 C.F.R. §291.8(a)(3); see also *id.*, §291.11(b)(3).

In turn, Texas law prohibits the operation of casinos. With narrow and inapplicable exceptions, the Texas Constitution categorically prohibits gambling in the State. Tex. Const. art. III, §47(a) (mandating that the State Legislature "pass laws prohibiting lotteries and gift enterprises"); see also Op. Tex. Att'y Gen. No. GA-0103, at

2-3, 8 (2003) (explaining that the Nineteenth Century meaning of "lotteries" included games of chance for a prize). Under this mandate, the Texas Legislature has "adopted numerous penal statutes that prohibit various aspects of gambling." *Id.*, at 1. For example, the Texas Penal Code prohibits anyone from owning, manufacturing, transferring, or possessing "any gambling device that he knows is designed for gambling purposes." Tex. Pen. Code §47.06(a).[4]

Given that IGRA and the invalidated regulations do not permit gaming by tribal-state compact that is otherwise unlawful in a State—and that casinos are prohibited in Texas—the Tribe could not engage in casino gaming on Texas land *even if* the Court held that the challenged gaming regulations were valid. Accordingly, the Tribe has no injury that is redressable on appeal.[5]

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4. That Texas law exempts from prosecution some persons participating in gaming activities in the privacy of their homes is no support for the legality of casino gaming in Texas. The play-at-home exemption applies only in places "to which the public does not have access, and excludes, among other places, streets, highways, restaurants, taverns, nightclubs, schools, hospitals, and the common areas of apartment houses, hotels, motels, office buildings, transportation facilities, and shops," Tex. Pen. Code §47.01(8); see also *id.*, §47.02(b), only when "no person receive[s] any economic benefit other than personal winnings," *id.*, §47.02(b)(2), and only when all persons have the same "chances of winning," *id.*, §47.02(b)(3). Because casinos generate proceeds other than winnings and retain an advantage, they fall outside the play-at-home exemption.

5. Texas's prohibition of casino gaming also defeats the Tribe's standing because its "injury" relies on the speculative conclusion that the Secretary would have ultimately permitted it to operate a casino in Texas—a conclusion that would violate §2710(d)(7)(B)(vii)(I) of

II. THE ISSUES PRESENTED DO NOT WARRANT FURTHER REVIEW.

A. The Tribe's Primary Issue Presented—Whether the Court of Appeals Erred by Invalidating the Secretary's Gaming Regulations—Is Neither Legally nor Practically Important.

The Tribe first asks the Court to review what it perceives as error in the court of appeals's analysis regarding the validity of the Secretary's gaming regulations. Pet. 16-20. But alleged error alone does not warrant review, see SUP. CT. R. 10, and there is no split in the circuits for the Court to resolve.

The Tribe's assertion that a direct and concrete conflict exists between the court of appeals's decision and decisions of other circuits is incorrect: the Fifth Circuit is the first and only circuit to have passed upon the validity of the gaming regulations at issue. As a result, the United States has correctly conceded:

> "No other court of appeals has yet addressed the validity of the [gaming] [r]egulations . . . and the decision below does not conflict with any decision of this Court. Further review of the decision of the court of appeals is unwarranted."

Fed. Br. in Opp. 9.

This case began when the State of Texas challenged the validity of the Secretary's 1999 gaming regulations.

IGRA. Cf. *Diamond*, 476 U.S., at 66 (noting that "unadorned speculation will not suffice to invoke the federal judicial power").

R.6. Texas asserted that, as written, the regulations conflict with IGRA by permitting the implementation of gaming compacts without either the State's consent *or* a judicial finding of bad-faith negotiation. R.7. The court of appeals agreed, concluding that the Secretary's 1999 regulations "are not a reasonable interpretation of IGRA, especially when viewed against 'their place in the overall statutory scheme.'" Pet. App. 36a-37a.

The Tribe's assertion that the court of appeals's decision conflicts with *United States* v. *Spokane Tribe of Indians*, 139 F.3d 1297, 1301-02 (CA9 1998), is incorrect. In *Spokane Tribe*, the Ninth Circuit did not pass upon the validity of the Secretary's 1999 gaming regulations; indeed, those regulations did not exist at the time of the Ninth Circuit's decision. Rather, the Ninth Circuit merely noted that at some point in the future, secretarial regulations might "be able to patch up the situation." *Id.*, at 1302.

Nor does *Seminole Tribe of Florida* v. *Florida*, 11 F.3d 1016 (CA11 1994), address the validity of the 1999 gaming regulations. Instead, the Eleventh Circuit simply acknowledged—five years before the Secretary's challenged regulations were implemented—that the federal government "may prescribe regulations governing class III gaming on the tribe's lands." *Id.*, at 1029. Although the Eleventh Circuit did embrace the concept of secretarial regulations playing a role in gaming on tribal lands, *ibid.*, it did not—and could not—embrace any particular, not-yet-existent set of regulations.

Like the Ninth Circuit's *Spokane Tribe* decision, the Eleventh Circuit's *Seminole Tribe* decision does not analyze the 1999 gaming regulations at issue in this

appeal. Neither decision discusses, examines, upholds, invalidates, or even mentions the Secretary's 1999 regulations because the regulations were not in existence at the time. Accordingly, there is no concrete split between the circuit courts for this Court to resolve. The Court should permit the issues to percolate in the courts of appeals until—if ever—a concrete disagreement presents itself.

Moreover, the issue is of minimal practical importance because, as previously explained, see *supra* at 8-9, the Tribe will be unable to lawfully operate casinos in Texas even if the Court granted its petition and upheld the validity of the challenged regulations. Because both IGRA and the invalidated regulations permit only gaming that is otherwise legal in a State—and because casinos are prohibited in Texas—the Tribe cannot reach its ultimate goal of operating casinos even if the Court renders judgment in its favor. *Ibid.*

B. The Tribe's Alternative Issue Also Does Not Warrant the Court's Attention.

1. The Tribe waived its alternative argument by not appealing the district court's judgment against it.

In its motion for summary judgment, the Tribe asked the district court to strike the provisions of IGRA requiring tribal-state compacts. See Pet. 25 n.64. The district court did not grant the Tribe's request, instead dismissing Texas's suit, without prejudice, on the basis of ripeness. Pet. App. 89a. The court denied all other requested relief, *ibid.*—such as the Tribe's request to strike provisions of IGRA.

Texas appealed the district court's judgment, but the Tribe did not cross-appeal—thereby waiving its opportunity to request greater relief on appeal than it obtained in the district court. As recently reaffirmed in *Greenlaw* v. *United States*, No. 07-330, 2008 WL 2484861, at *6-8 (U.S. June 23, 2008), the Court has consistently applied the "'inveterate and certain'" rule that, "[a]bsent a cross-appeal, an appellee . . . may not 'attack the [lower court's] decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary,'" *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479 (1999) (quoting *Morley Constr. Co.* v. *Md. Cas. Co.*, 300 U.S. 185, 191 (1937); *United States* v. *Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924)). The Tribe's failure to appeal the district court's judgment forecloses consideration of the additional relief requested through the Tribe's alternative issue.

2. The Tribe's claims of conflicts are incorrect.

The Tribe asserts that the court of appeals's decision not to address its alternative argument conflicts with this Court's precedent. Pet. i-ii, 20-26. However, the court of appeals's silence on the severability issue is consistent with this Court's decision in *Seminole Tribe*—which likewise declined to reach the issue. Nor does the court of appeals's decision conflict with that of other courts of appeals.

Although the Tribe's severability argument was reached—and rejected—by the Eleventh Circuit in *Seminole Tribe*, 11 F.3d, at 1016 (dismissing the same argument based on *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678 (1987), that the Tribe asserts here), this Court did not

engage in severability analysis upon review of the Eleventh Circuit's judgment. See *Spokane Tribe*, 139 F.3d, at 1299 (noting that the *Seminole Tribe* Court "did not consider whether the rest of IGRA survives"). The Court's silence on this issue in *Seminole Tribe* essentially forecloses the Tribe's argument that courts must pass on severability in the context of IGRA. Pet. Reply to Fed. Br. in Opp. 3. If the Tribe were correct that IGRA cannot operate consistent with congressional intent after its judicial-remedy provisions had been invalidated, then this Court itself erred in *Seminole Tribe* by failing to conduct the same severability analysis that its earlier decision in *Alaska Airlines* purportedly required.[6]

The Tribe's assertion that the court of appeals's failure to conduct severability analysis conflicts with the Eleventh Circuit's decision in *Seminole Tribe* and the Ninth Circuit's decision in *Spokane Tribe*, Pet. 23-24, is also unpersuasive. In *Seminole Tribe*, the Eleventh Circuit summarily *rejected* the Tribe's severability argument. 11 F.3d, at 1029. Likewise, the Ninth Circuit's decision in *Spokane Tribe* declined to invalidate any portion of IGRA. 139 F.3d, at 1301. Given that no circuit has struck any portions of IGRA that remain after this Court's *Seminole Tribe* decision, the court of appeals's election not to do so does not create a split.

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6. The Court should also note that *Seminole Tribe* was decided not only after *Alaska Airlines*, but also *before* the Secretary's 1999 gaming regulations were effected. If, as the Tribe insists, the absence of the 1999 regulations requires the Court to strike portions of IGRA based on *Alaska Airlines*, then the absence of the regulations back in 1996 would have also required the Court to strike those portions of IGRA in *Seminole Tribe*.

3. The court of appeals did not pass upon severability.

Just as the Court frequently postpones its review of issues on which only a nascent split of authority exists in the courts of appeals, the Court also does "not ordinarily consider questions not specifically passed upon by the lower court." *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); see *United States* v. *Williams*, 504 U.S. 36, 41-43 (1992) (countenancing review of issues not pressed below so long as they were passed upon—but not *vice versa*); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927) ("This court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."). The Court observes this rule, among other reasons, to enable less drastic or intrusive resolutions than a Supreme Court decision carries with it and to ensure that its own review proceeds with "the benefit of a well-developed record and a reasoned opinion on the merits" by the court below. *Bankers Life & Cas.Co.* v. *Crenshaw*, 486 U.S. 71, 79 (1988); cf. *Spokane Tribe*, 139 F.3d, at 1302 (noting multiple ways in which the post-*Seminole Tribe* version of IGRA could be enforced or amended in response to tribes' criticisms of its current operation).

In this case, the court of appeals did not address the Tribe's severability argument. At most, Judge King's concurrence suggests that the severability question was not adequately presented. Pet. App. 44a. Accordingly, if the Court granted review of the Tribe's alternative issue, it would lack the benefit of any analysis from the court of appeals. Given the drastic nature of the Tribe's requested

relief—that the Court should strike portions of a federal statute that, even under the Tribe's argument, are not unconstitutional—the Court should deny review of this issue as well.

III. JURISDICTIONAL CONCERNS RENDER THE TRIBE'S PETITION AN UNATTRACTIVE VEHICLE FOR ANALYZING THE ISSUES PRESENTED.

Although the State maintains that its challenge to the Secretary's 1999 gaming regulations is ripe and otherwise justiciable, both the Tribe and the United States vigorously asserted that the State's claim was not ripe and that the State lacked standing to challenge the regulations. See, e.g., R.373, 415, 670, 804. If the Tribe and the United States were correct, this Court would have no jurisdiction to reach either of the issues presented. Cf. *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11-12 (2004); *Nat'l Park Hospitality Ass'n* v. *Dep't of Interior*, 538 U.S. 803, 807-08 (2003). This potential jurisdictional barrier militates against granting the petition.

IV. THE COURT OF APPEALS'S JUDGMENT IS CORRECT.

Finally, the Court should deny the Tribe's petition because the court of appeals's decision is correct. The court of appeals correctly concluded that by permitting gaming in Texas without either the State's consent or a judicial finding of bad faith, the Secretary's 1999 regulations "violate the unambiguous language of IGRA and congressional intent." Pet. App. 40a; see also *id.*, at 42a-43a. Where, as in IGRA, the stated intent of Congress is not ambiguous, the courts, "as well as the agency, must give effect to the unambiguously expressed intent of

Congress." *Id.*, at 41a (quoting *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). Because the Secretary's 1999 regulations contravened the intent of Congress, the court of appeals appropriately invalidated them.

In addition, the Secretary's attempt to rewrite IGRA violated the separation-of-powers and non-delegation doctrines by usurping Congress's authority to prescribe federal law. Cf. *Touby* v. *United States*, 500 U.S. 160, 164-65 (1991) ("Congress may not constitutionally delegate its legislative powers to another branch of Government."); *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) (per curiam) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice."). Like the Court, the Secretary is not "free to rewrite the statutory scheme in order to approximate what [he thinks] Congress might have wanted had it known" that it was not able to subject States to tribal suits under IGRA. Cf. *Seminole Tribe*, 517 U.S., at 76. "If that effort is to be made, it should be made by Congress." *Ibid.*[7]

CONCLUSION

The Court should deny the petition for a writ of certiorari.

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7. The Tribe's severability argument likewise fails on its merits. IGRA continues to function as Congress intended—without the 1999 regulations—because IGRA does not permit gaming procedures that are inconsistent with state law, 25 U.S.C. §§2701(5), 2710(d)(7)(vii)(B)(I), and Texas state law prohibits casino gaming, see *supra*, at 8-9.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

SEAN D. JORDAN
Acting Solicitor General

RYAN D. CLINTON
Assistant Solicitor General
Counsel of Record

WILLIAM L. DAVIS
Assistant Solicitor General

NANCY JUREN
Assistant Attorney General

Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR RESPONDENT

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No. 07-1109

IN THE

Supreme Court of the United States

KICKAPOO TRADITIONAL TRIBE OF TEXAS,
Petitioner,

v.

STATE OF TEXAS, ET AL.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF OF FEDERAL RESPONDENTS IN OPPOSITION

EDMUND C. GOODMAN
HOBBS, STRAUS, DEAN
& WALKER, LLP
806 SW Broadway
Ste. 900
Portland, OR 97205
(503) 242-1745

JENNIFER P. HUGHES
Counsel of Record
CHARLES A. HOBBS
JERRY C. STRAUS
JOSEPH H. WEBSTER
HOBBS, STRAUS, DEAN &
WALKER, LLP
2120 L Street, NW, Ste. 700
Washington, DC 20037
(202) 822-8282

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Petitioner Kickapoo Traditional Tribe of Texas files this brief in reply to Federal Respondent's Brief in Opposition ("U.S. Br."). While the United States takes the position that the Court should deny review, its brief demonstrates that such review is warranted: it highlights the conflict among the circuits; it does not contest that the court below failed to address an issue of exceptional importance repeatedly pressed by the Tribe; and it reaffirms the Tribe's argument that the court below wrongly decided important issues of law.

The United States' Brief Highlights the Conflict Among the Circuits.

The United States asserts that the decision below does not conflict with the decisions on the same underlying issue by the Ninth and Eleventh Circuits.[1] The United States' own argument, however, demonstrates the conflict.

The United States does not quarrel with the Tribe's fundamental point that the *reasoning* of the Fifth Circuit's decision with regard to the continued availability of the Secretarial procedures remedy[2] in light of this Court's decision in *Seminole*[3] directly conflicts with the reasoning of the Ninth and Eleventh Circuits on the underlying question. This reasoning is key because it highlights the analytical framework under which the different circuits have reached conflicting results concerning the rights

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[1] *See Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994); *United States v. Spokane Tribe*, 139 F.3d 1297, 1301-02 (9th Cir. 1998).

[2] 25 U.S.C. § 2710(d)(7)(B)(vii).

[3] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

available to tribes under the Indian Gaming Regulatory Act ("IGRA").[4] Nor does the United States quarrel with the fundamental fact that the conflicting reasoning leads to different practical results among the circuits.

The United States merely asserts that the decision below is not in conflict with the Eleventh or Ninth Circuits because neither of those circuits has "yet addressed the validity of the Procedures Regulations." (U.S. Br.7, 9.) While this narrow assertion is accurate, it is also beside the point. The result of the Eleventh Circuit decision in *Seminole* (as well as the Ninth Circuit decision in *Spokane*) is that the Secretarial procedures remedy remains available to tribes facing a state that does not consent to adjudicate the question of its good faith; the result of the decision below is that the Secretarial procedures remedy is not available to tribes in the Fifth Circuit in the same circumstances. In this fundamental respect, the law in these other circuits is in direct conflict with that of the Fifth Circuit, and review by this Court is warranted.

The Fifth Circuit Refused to Adhere to this Court's Judicial Severance Doctrine.

It is significant that the United States does not contest the validity of the Tribe's argument under this Court's severance doctrine set out in *Alaska Airlines, Inc. v. Brock*;[5] to wit, that where judicial severance of a statute would result in the statute no longer operating in the manner intended by Congress, the remaining statutory framework must

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[4] 25 U.S.C. §§2701-2721, 18 U.S.C. §§1166-1168 (1988).
[5] 480 U.S. 678 (1987).

be struck down as well. Under these familiar principles, the Tribe and the United States agree that without the continued availability of the Secretarial procedures remedy, IGRA will no longer function in the manner intended by Congress. As the Tribe demonstrates, under *Alaska Airlines*, the Fifth Circuit was required to strike down all the state participation requirements of IGRA when it invalidated the Secretary's attempt to make available the fallback procedures remedy.

The United States' sole reason for asserting that this question does not warrant certiorari is that the Fifth Circuit "did not pass on this issue below." (U.S. Br. 10.) Yet the Fifth Circuit's failure to pass on this issue is the error requiring review, since this Court's precedent required that court to undertake this analysis. In addition, this failure to apply the *Alaska Airlines* severance analysis in evaluating the Procedures Regulations directly conflicts with the core decision of the Eleventh Circuit that Secretarial procedures had to be made available to the Seminole Tribe in order to save the statute.[6]

The authority cited by the United States supports the Tribe. In *Capitol Cities Cable, Inc. v. Crisp,* this Court stated that while it does not "ordinarily consider questions not specifically passed upon by the lower court, this rule is not inflexible," and found it appropriate to consider an issue that

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[6] In *Seminole*, the Tribe had argued that IGRA had to be declared unconstitutional if the judicial remedy provided by Congress to tribes could not be constitutionally applied. The Eleventh Circuit, citing *Alaska Airlines,* determined that this result could be avoided by an appropriate severance analysis that allowed the Tribe to obtain Secretarial procedures. *Seminole*, 11 F.3d at 1029.

had been, among other things, raised in petitioner's complaint and acknowledged by both the district court and court of appeals.[7] Similarly compelling circumstances are present in this case: the Tribe has consistently pressed this issue throughout this case,[8] the district court acknowledged and adopted the severance principles in its ruling,[9] and the concurring opinion below acknowledged the issue when recognizing that without the Procedures Regulations, IGRA would not function as Congress intended.[10] The Fifth Circuit's failure to pass on this issue is the fundamental flaw that puts it in direct conflict with this Court's precedent and the decision of the Eleventh Circuit in *Seminole*. It unfairly and unnecessarily leaves the Tribe with no answer to a critical question repeatedly raised that has a direct impact on its rights under IGRA.

The Fifth Circuit Erred on Exceptionally Important Issues.

The United States agrees with the Tribe that the Fifth Circuit's decision – in both its reasoning and its result – conflicts with Congress's intent in enacting IGRA, and, in particular, Congress's inclusion of the Secretarial procedures as a fallback remedy to maintain the careful compromise between

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[7] 467 U.S. 691, 697-98 (1984) (citation omitted), cited in the United States' Brief at 10.

[8] *See Kickapoo Traditional Tribe of Texas v. State of Texas Petition for Writ of Certiorari*, No. 07-1109, 2008 WL 534792, at *25 n.63 (Feb. 25, 2008).

[9] *Texas v. United States*, 362 F. Supp. 2d 765, 769-70 (W.D. Tex. 2005).

[10] *Texas v. United States*, 497 F.3d 491, 512 (5th Cir. 2007) (King, J., *concurring*).

tribes' right to offer gaming free of state regulation and states' desire for some authority in this area. The United States also does not appear to contest the Tribe's (and Amici's) description of the wide-ranging effects that will result if the decision below is allowed to stand.

The United States asserts that the "decision does not preclude the Secretary from taking future action to ensure that IGRA operates in a manner consistent with its purposes." (U.S. Br. 9.) It, however, does not explain what such future action might be or how it might be taken consistent with the decision of the court below. The fact remains that this erroneous Fifth Circuit decision voids the Secretary's attempt to make available the fallback remedy intended by Congress to ensure that IGRA operates in a manner consistent with its purposes.

On this issue of exceptional importance, the Fifth Circuit got it wrong, and its decision is in flat conflict with at least two other circuits.

The petition for certiorari should be granted.

RESPECTFULLY SUBMITTED:

EDMUND C. GOODMAN
HOBBS, STRAUS, DEAN
& WALKER, LLP
806 SW Broadway
Suite 900
Portland, OR 97205
(503) 242-1745

May 8, 2008

JENNIFER P. HUGHES
Counsel of Record
CHARLES A. HOBBS
JERRY C. STRAUS
JOSEPH H. WEBSTER
HOBBS, STRAUS, DEAN &
WALKER, LLP
2120 L Street, NW
Washington, DC 20037
(202) 822-8282

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In The
Supreme Court of the United States

KICKAPOO TRADITIONAL TRIBE OF TEXAS,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN SUPPORT OF PETITIONER FOR *AMICI CURIAE* JENA BAND OF CHOCTAW INDIANS, ALABAMA-COUSHATTA TRIBE OF TEXAS, CITIZEN POTAWATOMI NATION, COQUILLE INDIAN TRIBE, RINCON BAND OF LUISENO INDIANS, SHOALWATER BAY INDIAN TRIBE, SPOKANE TRIBE OF INDIANS, STANDING ROCK SIOUX TRIBE

KIMBERLY ANNE DEMARCHI
Counsel of Record
PETER R. WAND
LEWIS AND ROCA LLP
40 North Central Avenue
Phoenix, AZ 85004-4429
602-262-5728

SCOTT CROWELL
SCOTT WHEAT
CROWELL LAW OFFICES
1670 Tenth Street West
Kirkland, WA 98033
425-828-9070

Counsel for Amici Curiae

March 28, 2008

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Tribal *Amici*, Jena Band of Choctaw Indians, Alabama-Coushatta Tribe of Texas, Citizen Potawatomi Nation, Coquille Indian Tribe, Rincon Band of Luiseno Indians, Shoalwater Bar Indian Tribe, Spokane Tribe of Indians, and Standing Rock Sioux Tribe respectfully move for leave to file the attached brief as *amici curiae* in support of the Petition for Writ of Certiorari.

Under the Indian Gaming Regulatory Act ("IGRA")[1] as written, Congress gave the states only a limited role in the conduct of Indian gaming. Congress did not give the State of Texas, or any other state, a veto over tribal IGRA gaming activities, and it ensured that the tribal-state compact requirement would not become a state veto by providing a last-resort remedy for tribes in uncooperative states – the availability of tribal gaming under procedures prescribed by the Secretary of the Interior ("Secretarial procedures").

The Fifth Circuit's decision in this case strips tribes of the Secretarial procedures remedy. Every federally recognized tribe in the United States that is engaged in gaming or would like to be has a stake in the availability of a viable last-resort remedy to conduct gaming on its lands under IGRA. Any tribe

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[1] 25 U.S.C. § 2701 *et seq.*

that needs, now or in the future, to enter into, amend, or renew a tribal-state gaming compact under IGRA depends on the existence of a viable remedy against recalcitrant states. That last-resort remedy provides both a source of equalizing bargaining authority for tribes and an essential safeguard for those tribes whose lands are located in states that refuse to participate in IGRA negotiations. If the Fifth Circuit's decision in this case stands, and the remedy is unavailable, every tribe engaged in compact negotiations or renegotiations will be harmed. Some may still be able to obtain compacts, but the balance of power contemplated by Congress will have been disturbed and their bargaining power will have been substantially reduced. Other tribes will be unable to obtain compacts and will therefore be confronted with the Hobson's choice of operating in an uncertain and hostile environment or being deprived of the valuable opportunity to attain the economic self-sufficiency that tribal gaming represents and that Congress intended tribes to have when it enacted IGRA.

The Tribal *Amici* represent a broad spectrum of tribes from across the nation. Some of the Tribal *Amici* have obtained compacts after long struggles that demonstrate the essential role of the Secretarial procedures remedy in the statutory scheme envisioned by Congress, while others have been entirely unable to reach agreement with the states, and their efforts to utilize the Secretarial procedures remedy have been abruptly terminated by the Fifth Circuit's decision. Still other *amici* are tribes with existing

compacts concerned about the impact of the Fifth Circuit's decision on their ability to negotiate amendments and renewals of those compacts.

Each of the Tribal *Amici* has a substantial interest in the outcome of this petition as it affects their access to the gaming activities contemplated by IGRA. The *Amici* are uniquely situated to provide this Court with information about the importance of the Secretarial procedures remedy at issue in this case in a wide variety of factual circumstances affecting tribes around the country. The proposed *amicus* brief focuses on the particular experiences of the Tribal *Amici* in attempting to negotiate compacts and the importance of the Secretarial procedures remedy to their continued ability to do so. The dynamics of these negotiations illustrate the importance of the remedy at issue to the overall Congressional plan set forth in IGRA, a key factor in the severance analysis at issue here. The Tribal *Amici* therefore request leave of this Court to file the attached brief in support of the petition for writ of certiorari to provide this information for the Court's consideration in evaluating that petition.

Respectfully submitted,

KIMBERLY ANNE DEMARCHI
Counsel of Record
PETER R. WAND
LEWIS AND ROCA LLP
40 North Central Avenue
Phoenix, AZ 85004-4429
602-262-5728

SCOTT CROWELL
SCOTT WHEAT
CROWELL LAW OFFICES
1670 Tenth Street West
Kirkland, WA 98033
425-828-9070

Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae are federally-recognized tribes from across the nation. The impact of the Fifth Circuit's decision on their individual situations, discussed in more detail in the brief, demonstrates the exceptional importance of the issues presented in the petition for a writ of certiorari in this case. Some of the Tribal *Amici* have obtained tribal-state compacts only after long struggles that demonstrate the essential ro of the Secretarial procedures remedy, while others have been entirely unable to reach agreement with the states and their efforts to utilize the Secretarial procedures remedy have been abruptly terminated by this decision. The impact of the Fifth Circuit's decision on their individual situations demonstrates the exceptional importance of the issue raised by the petition for certiorari in this matter and the importance of proper application of this Court's severance jurisprudence to IGRA in order to avoid giving states

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. The Kickapoo Traditional Tribe and the State of Texas have consented to the filing of this brief. Their letters consenting to filing have been filed with the Clerk of the Court. The United States and its Department of Interior have not responded. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

a veto over Tribal IGRA gaming activities that Congress never intended.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be granted because this case raises an issue of paramount importance to every federally recognized tribe in the United States and the Fifth Circuit has addressed that issue in a way that conflicts with both the decisions of its sister circuits and the decisions of this Court.

The Tribal *Amici* set forth herein their own circumstances, which demonstrate the significant impact the Fifth Circuit decision has upon them. The experiences of the Tribal *Amici* include litigation in which another Circuit has reached the issue of IGRA's remedial provisions in the wake of the Supreme Court's decision in *Seminole* in a manner that conflicts with the Fifth Circuit decision. The experiences of the Tribal *Amici* demonstrate the necessity for tribes to have viable remedies when confronted by recalcitrant states, and demonstrate the effect upon negotiating compacts under IGRA when the well has been poisoned by the uncertainty of a viable remedy when states refuse to negotiate compacts in good faith. The Tribal *Amici* all therefore support the petition for certiorari submitted by the Kickapoo Traditional Tribe of Texas.

Under the Indian Gaming Regulatory Act ("IGRA") as written, Congress gave the states only a limited role in the conduct of Indian gaming. Congress did not give the State of Texas, or any other state, a veto over tribal gaming activities, and it made its intent clear that the tribal-state compact requirement should not become a veto by providing a last-resort remedy for tribes in uncooperative states – the availability of tribal gaming under procedures prescribed by the Secretary of the Interior ("Secretarial procedures").

The Fifth Circuit's decision in this case strips tribes of the Secretarial procedures remedy. As a result, tribes that have not been able to obtain tribal-state gaming compacts are without the last-resort remedy of Secretarial procedures Congress intended to provide, and those tribes may never be able to attain the economic self-sufficiency IGRA sought to provide to them. Tribes that have compacts are also negatively impacted. By depriving tribes of the remedy that was intended to establish a balance between tribes and states at the negotiating table, the Fifth Circuit's ruling has tipped the balance wholly in favor of the states, to the detriment of any tribe engaged in compact negotiations and directly contrary to Congress' intent when enacting IGRA.

By doing so, the Fifth Circuit brought its interpretation of IGRA into conflict with the decisions of the Ninth and Eleventh Circuits, which have held that a viable remedy must be available to Tribes because Congress did not intend for states to have a

veto of a tribe's IGRA gaming activities.[2] By invalidating the Secretarial procedures remedy but not conducting severance analysis regarding available remedies, if any, the Fifth Circuit also contravened this Court's precedent providing that severance of invalid statutory provisions is permitted only where Congress would still have enacted the statute with only the remaining provisions.[3] The three-judge panel of the Appeals Court, with three separate opinions, provides two opinions that the Secretarial procedures are invalid, and two opinions that tribes confronted with recalcitrant states must have a viable remedy. Because Congress would not have enacted the Class III compact requirement without providing a safeguard for tribes, the panel's invalidation of the Secretarial procedures while failing to conduct severance analysis regarding available remedies, if any, conflicted with this Court's prior relevant decisions.

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[2] *United States v. Spokane Tribe*, 139 F.3d 1297, 1301-02 (9th Cir. 1998); *Seminole Tribe v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994).

[3] *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987).

ARGUMENT

I. The Fifth Circuit's Decision Invalidating the Secretarial Procedures Conflicts with Two Other Circuits and Creates an Issue of Paramount National Importance.

Under IGRA as passed by Congress, the only tribes with eligible lands that would ever be completely unable to engage in Class III gaming were those tribes located in the few states that do not permit any Class III gaming anywhere in the state by any entity.[4] Any other tribe is entitled to game under IGRA, subject to the ability of the state in which it was located to participate in developing gaming procedures through *good faith* compact negotiations.[5]

Congress intended for the good-faith limitation on states' role in negotiating the terms of tribal gaming to be enforceable in federal court.[6] Recognizing that some states might still refuse to consent, Congress provided tribes with a safety net – the ability to obtain gaming regulations directly from the Secretary of the Interior, who has the express statutory authority to prescribe "procedures" to govern

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[4] 25 U.S.C. § 2710(d)(1)(B).

[5] 25 U.S.C. § 2710(d)(3).

[6] 25 U.S.C. § 2710(d)(7); *see also Seminole Tribe v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994) ("The Secretary then may prescribe regulations governing class III gaming on the tribe's lands. This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in §§ 2701-02.").

tribal gaming in the absence of a compact.[7] The invalidation of the Secretarial procedures remedy limits the authority of the Department of the Interior ("DOI") over tribal affairs in contravention of Congress' intent as well as the Secretary's general authority.[8]

When this Court struck down Congress' attempt to waive States' sovereign immunity to suits enforcing the good-faith negotiation requirement, the Secretary of the Interior – following the directive by the Eleventh Circuit in that same case[9] – used his general rulemaking authority and IGRA's delegated authority to fill the unintended gap, thereby providing tribes in states that will not waive sovereign immunity or otherwise consent to suit under IGRA with a path to the last-resort remedy provided by Congress.[10] By invalidating those regulations, the Fifth Circuit has now destroyed the delicate balance between tribes and states intended by Congress and brought the Fifth Circuit into conflict with two other Circuits that have found that a viable remedy was an

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[7] 25 U.S.C. § 2710(d)(7)(B)(vii).

[8] *See* 25 U.S.C. §§ 2, 9.

[9] *See Seminole Tribe*, 11 F.3d at 1029; *see also Seminole Tribe v. Florida*, 517 U.S. 44, 53 (1996) (granting *certiorari* on other issues).

[10] *See Seminole Tribe*, 517 U.S. at 47; 25 C.F.R. § 291 *et seq.* (1999).

indispensable component of the regulatory structure established by IGRA.[11]

The Ninth Circuit invalidated enforcement action by the United States against a Tribe for non-compacted Class III gaming where the State refused to consent to the negotiation/mediation process intended by Congress.[12] The Ninth Circuit reasoned that the United States must interpret IGRA, now broken by reasons set forth in this Court's *Seminole* decision, in a manner that manifests Congress' intent in passing IGRA. The Ninth Circuit identified several possible viable remedies. The Eleventh Circuit expressly stated that procedures promulgated by the Department of the Interior should govern the Tribe's gaming activities.[13] The Secretarial Procedures at issue here are the product of the Department of the Interior doing what the Ninth and Eleventh Circuits told it to do.

If the Fifth Circuit's decision is not addressed and corrected by this Court, a quagmire will exist where states that permit Class III gaming by tribal or non-tribal entities, will maintain that they may refuse to negotiate in good faith with other tribes that wish to game, with no further avenue or recourse for the tribes under IGRA. Tribes unable to reach a compact agreement with recalcitrant states will face

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[11] *See Seminole Tribe v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994); *see also* 25 U.S.C. §§ 2, 9 (Secretary's general authority).

[12] *United States v. Spokane Tribe*, 139 F.3d 1297, 1301-02 (9th Cir. 1998).

[13] *Seminole Tribe*, 11 F.3d at 1029.

the Hobson's choice between capitulating to unreasonable terms and conditions in a compact, not gaming despite the fact that gaming by others is permitted in the state, or gaming in the face of threats of enforcement action and protracted litigation. None of these choices is consistent with Congress' intent in passing IGRA.

Tribes with Indian lands inside and outside of the Fifth Circuit are severely impacted by the decision. The delicate balance of tribal, federal, and state interests that Congress intended is removed from the negotiating table if the certainty of an adequate remedy is unavailable to tribes. As demonstrated by the experiences of certain of the Tribal *Amici*, discussed below, states use the uncertainty of a viable remedy as false leverage which manifests itself in overreaching regarding the terms and conditions of a tribal/state compact.

The situations of the Tribal *Amici* demonstrate the predominant importance of this issue for tribes around the country and the need for the petition for writ of certiorari to be granted.

II. Without a Viable Remedy, Tribes Will Be Denied Economic Self-Sufficiency Through Gaming Under IGRA, Contrary to Congress' Purpose.

Congress, through IGRA, provided "a statutory basis for the regulation of gaming by Indian tribes as a means of promoting tribal economic development,

self-sufficiency, and strong tribal governments."[14] The tribes most directly and immediately affected by the Fifth Circuit's decision are those that have not yet been able to obtain tribal-state gaming compacts and, thereby, the benefit of economic self-sufficiency through gaming under IGRA that Congress intended to provide.

Amicus Jena Band of Choctaw Indians provides a stark example. The Jena Band is located in Louisiana, which permits Class III gaming by three other tribes and by non-tribal, private entities, but refuses to negotiate a compact with the Jena Band because the Governor believes additional gaming within the state is undesirable.[15] The Jena Band brought suit under IGRA to force good-faith negotiations, but Louisiana asserted its Eleventh Amendment immunity and the suit was dismissed.[16] The Jena Band then sought Secretarial procedures under the

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[14] 25 U.S.C. § 2702.

[15] LA. REV. STAT. ANN. tit. 27; 58 Fed. Reg. 36,264 (July 6, 1993) (approving compact with Chitimacha Tribe of Louisiana); 65 Fed. Reg. 31,189 (May 16, 2000) (approving compact with Louisiana Coushatta Tribe); 57 Fed. Reg. 54,415 (Nov. 18, 1992); Press Release, Governor Kathleen Babineaux Blanco, *Governor Blanco Responds to Jena Band of Choctaw Indians' Efforts to Establish Gaming in Louisiana* (Apr. 12, 2005) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of this document with the Clerk of the Court upon request).

[16] *Jena Band of Choctaw Indians v. Blanco*, No. 3:05-cv-00852-JJB-DLD (M.D. La. Mar. 8, 2006) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of this unpublished decision with the Clerk of the Court upon request).

regulatory process invalidated by the Fifth Circuit decision in this case, and it was close to completing the process to obtain Secretarial procedures permitting it to game when the Fifth Circuit's decision was issued; that process is now subject to an indefinite hold. Without either reversal of the Fifth Circuit's decision or a change of heart by the State of Louisiana, the Jena Band is not generating gaming revenues, while their sister Louisiana tribes and non-tribal entities are able to raise needed funds through gaming activities. The Jena Choctaw must now either forego gaming or face the quagmire confronted by other Tribal *Amici*, discussed below.

III. Allowing the Fifth Circuit Decision to Stand Creates an Unintended Quagmire in Which Tribes Confronted by Recalcitrant States Must Either Forego Gaming or Take Unnecessary Risks – An Untenable Situation that Congress Intended to Avoid by Passing IGRA.

Failure to grant certiorari in this litigation will leave unresolved the critical question of what remedy, if any, is available to Tribes when confronted by recalcitrant states, as it has been since this Court's decision in *Seminole Tribe*. Three tribes with Indian lands in Washington State have experienced the quagmire that exists in such an uncertain environment.

The Confederated Tribes of the Colville Reservation filed an IGRA lawsuit against Washington State

in 1992. Washington State asserted defenses alleging IGRA violated the Tenth and Eleventh Amendments. The District Court agreed with the State, but then engaged in severance analysis and struck down all of IGRA's compacting provisions rather than leave the Tribe without a viable remedy.[17] Despite that decision, and despite the Ninth Circuit decision involving the Spokane Tribe, *supra,* the United States brought enforcement action against the Tribes' Class III gaming operation.[18] After initially ruling against the Tribes and being reversed and remanded by the Ninth Circuit the District Court stayed further proceedings while the Colville Tribes initiated the process for Secretarial Procedures.[19] The State of Washington ultimately agreed to a compact with the Colville Tribes, but only after the Tribes capitulated

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[17] *Confederated Tribes of the Colville Reservation v. Washington*, No. CS-92-0426, slip. op. at 4-5 (E.D. Wash. June 4, 1993) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of this unpublished decision with the Clerk of the Court upon request).

[18] *United States v. 794 Electronic Gambling Machines*, No. CS 98-264-FVS (E.D. Wash.) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of the complaint in this action with the Clerk of the Court upon request).

[19] *United States v. 794 Electronic Gambling Machines*, No. CS 98-264-FVS (E.D. Wash. Dec. 10, 1998) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of this order with the Clerk of the Court upon request); *United States v. 794 Electronic Gambling Machines*, Nos. 99-35153, 99-35154 (9th Cir. 1999) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of this memorandum decision with the Clerk of the Court upon request).

to the State's demand that the Tribes withdraw its application for Secretarial Procedures.

Amicus Spokane Tribe, whose case gave rise to the Ninth Circuit opinion with which the Fifth Circuit's decision conflicts, spent eighteen years trying to obtain a compact.[20] Like the Colville Tribes, the Spokane Tribe filed a lawsuit against Washington State under IGRA, which was ultimately dismissed after the Supreme Court's decision in *Seminole*. The Tribe proceeded with Class III gaming activities in the absence of a tribal/state compact, and the United States responded by obtaining an injunction against the Tribe from the District Court under IGRA. The Ninth Circuit struck down the injunction, reasoning that the State of Washington could not deprive the Tribe of its gaming rights by refusing to consent to IGRA's negotiation/mediation process.[21] Even after that decision, the United States continued enforcement actions against the Spokane Tribe, alleging that a seizure action by the United States Attorney or a closure order by the National Indian Gaming Commission were still available to the United States. After initially ruling against the Tribe on the seizure theory and being reversed and remanded by the Ninth Circuit, the District Court stayed further

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[20] *United States v. Spokane Tribe*, 139 F.3d 1297, 1299 (9th Cir. 1998).

[21] *Id.*

proceedings while the Spokane Tribe sought a negotiated compact with the State.[22]

Amicus Shoalwater Bay Indian Tribe was shuttered by the United States for offering machine gaming that the District Court determined was not within the scope of "permitted" gaming under IGRA.[23] The Tribe re-opened with machines that were within the scope of "permitted" gaming, only to have the National Indian Gaming Commission ("NIGC") issue a Closure Order. In the Tribe's appeal to an Administrative Law Judge, the enforcement action by the NIGC was stayed until either the Tribe and State reached agreement on a compact, or the Secretary could demonstrate that the Secretarial Procedures were a real and viable remedy.[24] While the enforcement action was stayed, the Tribe and State reached agreement on the terms of a compact.

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[22] *United States v. 1020 Electronic Gambling Machines*, 38 F. Supp. 2d 1219 (E.D. Wash. 1999) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of this order with the Clerk of the Court upon request); *United States v. Spokane Tribe of Indians*, No. 99-35155 (9th Cir. Dec. 27, 1999) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of this memorandum decision with the Clerk of the Court upon request).

[23] *Shoalwater Bay Tribe v. United States*, No. C 98-668 R (W.D. Wash. 1998) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of this unpublished decision with the Clerk of the Court upon request).

[24] *In the Matter of Shoalwater Bay*, No. NIGC 99-2 (United States Dept. of the Interior Office of Hearings and Appeals, 1999) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of this document with the Clerk of the Court upon request).

All three of these tribes initially sought compacts shortly after the passage of IGRA in 1988. As a result of this Court's decision in *Seminole Tribe*, all three were denied the ability to bring the recalcitrant State of Washington to the negotiating table and had to seek other remedies. All three operated Class III gaming under constant threats of improper enforcement action and financial uncertainty. For more than fifteen years, they were faced with the Hobson's choice of either not engaging in Class III gaming or engaging in such activity under the constant threat of enforcement action. They reached compacts only after protracted litigation in which the State of Washington was confronted with the reality that IGRA was not intended to function as a State veto over tribal Class III gaming. If the Secretarial procedures had been implemented (as opposed to simply being on the books), it would have avoided this drawn-out and costly legal battling and would have ensured – at a much earlier point in the process – that tribal Class III gaming was conducted by these tribes for the purposes and under the regulatory framework intended by IGRA.

The Fifth Circuit's decision returns tribes around the country, once again, to circumstances Congress did not intend, in contravention of this Court's severance jurisprudence. Even with a severance clause, unconstitutional provisions of a statute cannot be severed and other provisions left intact if

the resulting statute would be inconsistent with Congress' intent.[25] The Secretarial procedures remedy is an essential safeguard for tribes that preserves their bargaining power and their ability to use gaming under IGRA as an economic development tool.[26] By refusing to recognize the validity of Secretarial procedures, the Fifth Circuit's decision results in a version of IGRA that Congress would never have passed. The Circuit decision therefore conflicts with this Court's established precedent regarding statutory severance, and this too justifies granting the petition for a writ of certiorari.

IV. Even Tribes with Existing Compacts Need the Secretarial Procedures to Ensure a Level Playing Field During Future Negotiations to Renew or Amend Compacts.

Compacts do not last forever. Every state except Washington, Kansas, and Minnesota has expiration dates in its compacts, and even those without pending expiration dates require occasional amendments to adjust to changing circumstances. Without the availability of a Secretarial procedures remedy, or other viable remedy, tribes have no real bargaining power in their negotiations to renew or amend

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[25] *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987).

[26] *See Spokane Tribe*, 139 F.3d at 1299; *see also* S. Rep. No. 100-446, at 13 (1988) ("It is the Committee's intent that the compact requirement for Class III not be used as a justification by a state for excluding Indian tribes from such gaming.").

compacts. The Fifth Circuit's decision in this case tells states that, if they wish to oppose tribal gaming in whole or in part, they can simply refuse to negotiate, even if they lack a good faith basis for doing so. What remaining bargaining authority can tribes have without either the judicial protection of good-faith litigation contemplated by IGRA (struck by this Court in *Seminole*) or the last-resort Secretarial procedures prescribed by Congress (struck by the Fifth Circuit)? The Fifth Circuit's decision, if permitted to stand, permanently poisons the well for tribes that want to offer gaming.

DOI's track record prior to Texas bringing suit was far from exemplary. Indeed, DOI's failure to take action in a timely fashion on those tribes that applied for the Secretarial Procedures remedy was critical to the Administrative Law Judge's decision regarding the Shoalwater Bay Tribe, discussed above. The existence of dozens of compacts from tribes in a number of states since the issuance of the Supreme Court decision in *Seminole* does not demonstrate that IGRA works despite the tribes' lack of a viable remedy. Rather, the states' assertions that the Secretarial Procedures are invalid coupled with the United States' inactivity on pending applications continued to poison the well at all IGRA negotiation tables. These compacts contain terms and conditions that are the product of a poisoned well, and many of the

provisions contained therein may be the product of State overreaching.[27]

Tribes such as the *Amicus* Coquille Tribe, whose compact with Oregon may be affected by pending legal challenges to the validity of Oregon's tribal-State compacts,[28] are impacted by the Fifth Circuit's decision. If the Oregon compacts are struck down by the courts and the Tribes must return to the negotiating table to reach new ones, *Amicus* Coquille may be without recourse if the State takes advantage of the imbalance of power created by the Fifth Circuit's decision.

Tribes like *Amici* Citizen Potawatomi Nation, Rincon Band of Luiseno Mission Indians, and Standing Rock Sioux Tribe, who presently have tribal-state compacts, anticipate the Fifth Circuit decision will impact their ability to negotiate necessary compact

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[27] *See, e.g.*, *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 931-33 (7th Cir. 2008) (questioning the validity of revenue sharing provisions in tribal/state compacts).

[28] The validity of Oregon's compact with the Confederated Tribe of Coos, Umpqua, and Siuslaw Indians is currently being challenged in state court. *State ex rel. Dewberry v. Kulongoski*, No. A124001 (Or. App.) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of the complaint in this case with the Clerk of the Court upon request). That challenge also has the potential to affect the Coquille Tribe's compact. Other tribes have faced similar challenges. *See, e.g.*, *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997); *Warren v. United States*, No. 06-CV-00226 (W.D.N.Y., filed Aug. 16, 2006) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of the complaint in this case with the Clerk of the Court upon request).

amendments and renewals. Each of these tribes has been a party to contentious compact negotiations, has faced choices of making concessions at the negotiation table rather than initiating uncertain and protracted litigation regarding the availability of a remedy to hold states accountable at the negotiating table for the good faith conduct Congress required. These tribes have seen firsthand the effect that the existence of IGRA's remedies has in keeping states at the negotiating table and allowing the tribes and the states to reach agreement on compact terms. All of these tribes have a stake in the continued availability of fair negotiations with states, negotiations that are ensured by the existence of a last-resort remedy in IGRA for tribes that face uncooperative states.

CONCLUSION

For the foregoing reasons, *Amici* urge this Court to grant the petition for writ of certiorari and to reverse the decision of the Fifth Circuit, restoring the Secretarial procedures remedy or to apply the necessary severance analysis interpreting IGRA in the wake of the *Seminole* decision in a manner that

provides tribes a viable remedy against recalcitrant states, as intended by Congress.

Respectfully submitted,

KIMBERLY ANNE DEMARCHI
Counsel of Record
PETER R. WAND
LEWIS AND ROCA LLP
40 North Central Avenue
Phoenix, AZ 85004-4429
602-262-5728

SCOTT CROWELL
SCOTT WHEAT
CROWELL LAW OFFICES
1670 Tenth Street West
Kirkland, WA 98033
425-828-9070

Counsel for Amici Curiae